Supreme Court, U.S.
FILED

09-815 DEC 30 2009

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NO. _____

IN THE
SUPREME COURT OF THE UNITED STATES

FREQUENT FLYER DEPOT, INC., GEORGE PIRKLE AND ROBERT PIRKLE,

Petitioners,

vs.

AMERICAN AIRLINES, INC.

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE COURT OF APPEALS, SECOND DISTRICT OF TEXAS, FORT WORTH

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

The Airline Deregulation Act of 1978, as amended, 49 U.S.C. § 41713(b)(1), preempts state "law, regulation, or other provision having the force and effect of law related to a price, route, or service of an air carrier that may provide air transportation under this subpart." In this case, Texas courts declined to preempt an airlines' business tort claims made against persons engaged in commerce with the airlines' frequent flyer miles. The questions presented are:

Whether 49 U.S.C. § 41713(b)(1) only preempts claims against certificated air carriers.

If preemption is limited by the identity of the alleged wrongdoer, what criteria are to be used in making the determination of whether a state law claim against a particular person is preempted.

Whether 49 U.S.C. § 41713(b)(1) preempts state business tort claims that act as a "law, regulation or other provision having the effect of law related to a price, route, or service of an air carrier."

PARTIES TO THE PROCEEDING

Petitioners are Frequent Flyer Depot, Inc., a Texas corporation, and George Pirkle and Robert Pirkle, the officers and shareholders of Frequent Flyer Depot, Inc.

Respondent American Airlines, Inc. is a wholly owned subsidiary of AMR Corp., a publicly traded company.

Other parties in the trial court are Luxury Travel Source, Mukesh Kuhmar Goyal, Main St. Travel Center of Monsey, Inc. and Ben Weber.

Rule 29.6 STATEMENT

Frequent Flyer Depot, Inc. has no parent corporation, nor does any corporation own more than 10% of the stock of Frequent Flyer Depot, Inc. and it is not a publicly traded company.

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PETITION FOR A WRIT OF CERTIORARI

Frequent Flyer Depot, Inc., George Pirkle and Robert Pirkle (jointly referred to as "Petitioners" or "Frequent Flyer") seek reversal of the temporary injunction entered by the 67th Judicial District Court, Tarrant County, Texas, in favor of American Airlines, Inc. ("American") on the ground that the business tort claims upon which the temporary injunction is based are preempted by 49 U.S.C. § 41713(b)(1).

OPINIONS OF LOWER COURTS

American sued Frequent Flyer on August 2, 2007, in 67th Judicial District Court, Tarrant County, Texas, Cause No. 067-224132-07. (Pet. App. 31A-52A). Frequent Flyer raised the affirmative defense that American's tort claims are preempted by 49 U.S.C. §41713(b). (Pet. App. 77A-79A).[1]

The trial judge preliminarily enjoined Frequent Flyer from brokering the sale and purchase of frequent flyer miles on September 19, 2008. (Pet. App. 28A-30A). Frequent Flyer appealed to the Texas Second Court of Appeals at Fort Worth, Texas, raising a number of issues, including preemption. Tex. Civ. Prac. & Rem. Code, § 51.014(a)(4). The Court of Appeals affirmed on February 26, 2009. *Frequent Flyer Depot, Inc. v. Am. Airlines, Inc.* 281 S.W.3d 215 (Tex. App. – Fort Worth 2009, pet. denied). (Pet. App. 3A-27A).

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[1] Frequent Flyer counterclaimed for violations of the Texas antitrust statutes, among other things. (Pet. App. 53A-76A).

Frequent Flyer petitioned the Texas Supreme Court to review the lower court's holdings on March 25, 2009. Tex. Gov't Code § 22.001(a)(2). The petition was denied on August 21, 2009. (Pet. App. 2A). Petitioners' motion for rehearing was denied on October 9, 2009. The Texas Supreme Court did not issue an opinion. (Pet. App. 1A).

STATEMENT OF JURISDICTION

The Court has jurisdiction pursuant to 28 U.S.C. § 1257. Texas courts erred in applying governing federal law to Texas business tort law when granting and affirming the temporary injunction against the Petitioners. *Org. for a Better Austin v. Keefe,* 402 U.S. 415 (1971). Texas courts also erred in finding that American's claims against Petitioners were not preempted. *Mitchell v. Forsyth,* 472 U.S. 511, 525 (1985); *see also, Belknap Inc. v. Hale,* 496 U.S. 491, 497 (1983).

CONSTITUTIONAL AND STATUTORY PROVISIONS

The lower courts' actions and this Petition involve the application of federal law to state business tort claims[2], U.S. Const. amend. XIV and provisions of the Airline Deregulation Act of 1978,

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[2] The issues presented in this Petition do not relate to personal injury torts which are the subject of separate jurisprudence. *See Taj Mahal Travel, Inc. v. Delta Air Lines,* 164 F.3d 186 (3rd Cir. 1998); *Charas v. Trans World Airlines, Inc.,* 160 F.3d 1259 (9th Cir. 1998); *Farash v. Cont'l Airlines,* Inc., 574 F.Supp. 356 (S.D. N.Y. 2008); *Atl. Coast Airbus v. Cook,* 857 N.E.2d 989 (Ind. 2006)

P.L. 95-504, as amended, 49 U.S.C. § 40101(a), 40101(f), 40102(a)(2), 40102(a)(45), 41712(a), and 41713(b)(1). The constitutional and statutory provisions follow.

U.S. Const. amend. XIV

> Section 1. All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the state wherein they reside. No state shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any state deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

49 U.S.C. § 40101

> (a) Economic Regulation.— In carrying out subpart II of this part and those provisions of subpart IV applicable in carrying out subpart II, the Secretary of Transportation shall consider the following matters, among others, as being in the public interest and consistent with public convenience and necessity:
>
> * * *
>
> (4) the availability of a variety of adequate, economic, efficient, and low-priced services without unreasonable discrimination or unfair or deceptive practices.

* * *

(6) placing maximum reliance on competitive market forces and on actual and potential competition—
(A) to provide the needed air transportation system; and
(B) to encourage efficient and well-managed air carriers to earn adequate profits and attract capital, considering any material differences between interstate air transportation and foreign air transportation.

* * *

(9) preventing unfair, deceptive, predatory, or anticompetitive practices in air transportation.

(10) avoiding unreasonable industry concentration, excessive market domination, monopoly powers, and other conditions that would tend to allow at least one air carrier or foreign air carrier unreasonably to increase prices, reduce services, or exclude competition in air transportation.

* * *

(f) Strengthening Competition.— In selecting an air carrier to provide foreign air transportation from among competing applicants, the Secretary of Transportation

shall consider, in addition to the matters specified in subsections (a) and (b) of this section, the strengthening of competition among air carriers operating in the United States to prevent unreasonable concentration in the air carrier industry.

49 U.S.C. § 40102(a)(2)

(2) "air carrier" means a citizen of the United States undertaking by any means, directly or indirectly, to provide air transportation.

49 U.S.C. § 40102(a)(45)

(45) "ticket agent" means a person (except an air carrier, a foreign air carrier, or an employee of an air carrier or foreign air carrier) that as a principal or agent sells, offers for sale, negotiates for, or holds itself out as selling, providing, or arranging for, air transportation.

49 U.S.C. § 41712(a)

(a) In General.— On the initiative of the Secretary of Transportation or the complaint of an air carrier, foreign air carrier, or ticket agent, and if the Secretary considers it is in the public interest, the Secretary may investigate and decide whether an air carrier, foreign air carrier, or ticket agent has been or is engaged in an unfair or deceptive practice or an unfair method of competition in air transportation or the sale of air transportation. If the Secretary, after notice

> and an opportunity for a hearing, finds that an air carrier, foreign air carrier, or ticket agent is engaged in an unfair or deceptive practice or unfair method of competition, the Secretary shall order the air carrier, foreign air carrier, or ticket agent to stop the practice or method.
>
> 49 U.S.C. § 41713(b)(1)
>
> Except as provided in this subsection, a State, political subdivision of a State, or political authority of at least 2 States may not enact or enforce a law, regulation, or other provision having the force and effect of law related to a price, route, or service of an air carrier that may provide air transportation under this subpart.

STATEMENT OF THE CASE

American is a major air carrier. American operates the AAdvantage frequent flyer program by which AAdvantage members obtain and use AAdvantage frequent flyer miles ("Miles"). AAdvantage members acquire Miles by flying on American and other airlines with whom American has "partner" agreements which enable AAdvantage members to earn and use Miles on those airlines, (Pet. App. 83A-87A), and from third persons to whom American sells Miles for distribution. (Pet. App. 34A-35A). AAdvantage members can use their Miles to purchase tickets from American and other airlines, and to purchase a variety of goods and services unrelated to American and air transportation. (Pet. App. 34A-35A; 82A-83A).

AMR Corp., American's parent corporation, reported with regard to American's AAdvantage program:

> American sells mileage credits and related services to other participants in the AAdvantage program. There are over 1,000 program participants, including leading credit card issuer, hotels, car rental companies and other products and services companies in the AAdvantage program. . . . Under its agreements with AAdvantage members and program participants, the Company reserves the right to change the AAdvantage program any time without notice, and may end the program with six months notice. As of December 31, 2007, AAdvantage had approximately 60 million total members, and 613 billion outstanding award miles. During 2007, AAdvantage issued approximately 200 billion miles, of which approximately one-half were sold to program participants.

AMR Corp. 2007 10-K filed with the Securities and Exchange Commission (Pet. App. 100A-101A).

The AAdvantage terms provide that (a) AAdvantage members do not own their Miles, (b) the accumulation of Miles does not entitle AAdvantage members to any vested rights, (c) AAdvantage members may not rely upon the continued availability of any award or award level, (d) American can change the AAdvantage terms at any time, and (e) the sale or barter of Miles is prohibited. (Pet. App. 92A-99A). American claims that the AAdvantage terms constitute a contract. Petitioners

contest that assertion. American's claims relate to its prohibition against the sale or barter of Miles.

Frequent Flyer competes with American by brokering the sale and purchase of frequent flyer miles issued by American and other airlines. (Pet. App. 44A; 88A-91A). Tickets to fly on American can be purchased with brokered Miles at a cost less than tickets purchased directly from American. (Pet. App. 39A; 80A-81A). Among other things, Frequent Flyer makes reservations and arranges the purchase of airline tickets for its customers. (Pet. App. 81A-82A; 88A-91A).

American alleges that Petitioners wrongfully assisted AAdvantage members to sell their Miles. American seeks to recover damages and to obtain temporary and permanent injunctive relief to prevent Frequent Flyer from brokering the sale of Miles. American alleges that Frequent Flyer committed the Texas torts of (a) tortious interference with contract, (b) tortious interference with prospective business relations, (c) misappropriation of award tickets, and (d) fraud in obtaining award tickets.[3] (Pet. App. 40A-49A). The trial court preliminarily enjoined Frequent Flyer from brokering the sale and purchase of Miles. (Pet. App. 28A-30A).

REASONS FOR GRANTING THE PETITION

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[3] American sued Robert Pirkle for alleged breach of contract by acquiring Miles for his personal use. The contract claim did not form a basis for the claim for injunctive relief.

This case involves the application of 49 U.S.C. § 41713(b)(1) to business tort claims made against persons involved with air transportation who are not certificated air carriers. 14 C.F.R. § 380.2. The 49 U.S.C. § 41713(b)(1) preemption is part of the Airline Deregulation Act of 1978, P.L. 95-504, as amended, and preempts state "law, regulation or other provision having the effect of law related to a price, route, or service of an air carrier." The Texas courts answered important questions of federal law related to the scope of the 49 U.S.C. § 41713(b)(1) preemption that have not been settled by this Court. The Texas courts' answers conflict with the Constitution, with decisions of this Court and with decisions of lower federal courts. This case involves a "closer working out" of the scope of the 49 U.S.C. § 41713(b)(1) preemption. *Am. Airlines v. Wolens,* 513 U.S. 219, 234-5 (1995).

Claims under state consumer protection statutes made against certificated air carriers related to their frequent flyer programs are preempted by 49 U.S.C. § 41713(b)(1). *Id.* at 222. Not yet resolved by this Court are whether the preemption applies equally to persons who are not certificated air carriers, 14 C.F.R. § 380.2, and whether 49 U.S.C. § 41713(b)(1) preempts common law business tort claims.

The reasons to grant the Petition are to resolve (a) whether 49 U.S.C. § 41713(b)(1) preempts claims involving air transportation against persons who are not certificated air carriers, (b) if the preemption is limited by the identity of the alleged wrongdoer, what criteria are to be used in making the determination of whether a state law claim

against a particular person is preempted, and, (c) whether 49 U.S.C. § 41713(b)(1) preempts common law business torts that act as a "law, regulation or other provision having the effect of law related to a price, route, or service of an air carrier."

Statutory Construction

49 U.S.C. § 41713(b)(1) unequivocally and plainly provides that no state shall impose any law related to the prices, routes or services of an air carrier. An "'air carrier' means a citizen of the United States undertaking by any means, directly or indirectly, to provide air transportation." 49 U.S.C. § 40102(a)(2). Nothing in 49 U.S.C. § 41713(b)(1) limits the preemption to identifiable "beneficiaries" of the statute or only to "official" regulations and law.[4]

Resolution of the issues presented depends upon the proper construction of 49 U.S.C. § 41713(b)(1) through reference to Congressional intent. *Medtronic, Inc. v. Lohr*, 518 U.S. 470, 485-6 (1996). The strong presumption is that Congressional intent is expressed in the plain language of the statute. Congressional intent is only overcome in "rare and exceptional circumstances." *United States v. Clintwood Elkhorn Mining Co.*, 553 U.S. ____, 128 S.Ct. 1511, 1518, 170 L.Ed.2d 392, 401 (2008); *also Ardestani v. INS*, 502 U.S. 129, 135 (1991); *Rubin v. United States*, 449 U.S. 424, 430 (1981).

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[4] This Court permitted the enforcement of self imposed obligations in *Wolens*, 513 U.S. at 229, and the courts' treatment of personal injury torts has been distinct from statutory and business tort law.

Congress evidenced a strong intent that the 49 U.S.C. § 41713(b)(1), as part of the Airline Deregulation Act of 1978, be construed broadly to support competition. As noted in its consideration of the predecessor to 49 U.S.C. § 41713(b)(1), the Court concluded that Congress, in 1978, "determining that 'maximum reliance on competitive market forces' would best further 'efficiency, innovation, and low prices,' as well as 'variety [and] quality of air transportation services,' enacted the Airline Deregulation Act." *Morales v. Trans World Airlines, Inc.*, 504 U.S. 374, 378-9 (1992).

Congress provided that in carrying out its economic regulation of the aviation industry, 49 U.S.C. §§ 41101-42121, the Secretary of Transportation "shall consider the following matters, among others, as being in the public interest:" "adequate, economic, efficient, and low-priced services without unreasonable discrimination, or unfair trade practices," 49 U.S.C. § 40101(a)(4) "placing maximum reliance on competitive market forces and on actual or potential competition," 49 U.S.C. § 40101(a)(6) "preventing unfair, deceptive, predatory, or anticompetitive practices in air transportation," 49 U.S.C. § 40101(a)(9) and "strengthening competition." 49 U.S.C. § 40101(f). The Texas courts eliminated Frequent Flyer's competition with American.

The Texas courts enforced state law "related to" American's prices, routes and services by enforcing AAdvantage terms against strangers to the purported contracts between American and AAdvantage members by holding the Petitioners

responsible in tort for breaches of American's claimed contract by AAdvantage members. The Texas courts eliminated Frequent Flyer Depot as a competitor. The effect is that AAdvantage terms have the force of law.

Courts broadly read the 49 U.S.C. § 41713(b)(1) preemption. *Morales,* 504 U.S. at 383-4, *also Rowe v. N.H. Motor Transp. Assoc.*, 552 U.S. 364 (2008); *Wolens,* 513 U.S. 219. In *Morales,* 504 U.S. at 384 the Court held:

> True to our word, we have held that a state law "relates to" an employee benefit plan, and is pre-empted by ERISA, 'if it has a connection with or reference to such a plan." *Shaw, supra,* at 97. Since the relevant language of the ADA is identical, we think it appropriate to adopt the same standard here: *State enforcement actions having a connection with, or reference to, airline "rates, routes, or services" are pre-empted* under 49 U. S. C. App. § 1305(a)(1) [now 49 U.S.C. § 41713(b)(1)].

(Emphasis added). In *Wolens,* the Court found that the preemption encompassed statutory claims related to American's frequent flyer miles.[5] 513 U.S. at 227.

The Texas courts narrowly read 49 U.S.C. § 41713(b)(1) to avoid preemption of common law business tort claims made against persons who are

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[5] In this case, the contractual claim against Robert Pirkle for a flight to Las Vegas did not provide a basis for the granted injunctive relief.

not certificated air carriers related to frequent flyer miles.

Federal Courts Preempt Claims Against Persons Who Are Not Certificated Air Carriers

Federal courts have read 49 U.S.C. § 41713(b)(1) to preempt actions against certificated and direct air carriers and against persons who are not direct or certificated air carriers. 49 U.S.C. § 41713(b)(1) preempts statutorily based claims raised against a certificated air carrier by consumers related to the air carrier's frequent flyer program. *Wolens*, 513 U.S. 219. In *Morales*, the Court preempted state attorney general guidelines for the application of state consumer protection laws to airline fares and frequent flyer miles. Although the guidelines directly related to airlines, the guidelines related to the practices of others selling airline tickets, such as ticket agents. The Court made no distinction between airlines and others to whom the guidelines might. Lower federal courts have held that 49 U.S.C. § 41713(b)(1) preempts claims against (a) travel agencies and charter companies providing services to individuals traveling to Cuba or who wish to send humanitarian aid or family remittances to Cuba, *ABC Charters, Inc. v. Bronson*, 591 F. Supp. 2d 1272, 1288 (S.D. Fla. 2009); (b) a company providing a computer reservation system to an air carrier, *Lyn-Lea Travel Corp. v. Am. Airlines, Inc.*, 283 F.3d 282, 287 (5th Cir.), *cert. denied* 537 U.S. 1044 (2002) ("ADA preemption is not limited to claims brought directly against air carriers. Rather, claims are preempted if they 'relate to' the prices, routes or services of an air carrier." citations omitted); (c) the trucking operations of an air carrier,

Fed. Express Corp. v. Cal. Pub. Util. Comm'n, 936 F.2d 1075 (9th Cir. 1991), *cert. denied* 504 U.S. 979 (1992); (d) a company providing pre-departure clearance of passengers, *Huntleigh Corp. v. La. State Bd. of Private Sec. Exam'rs,* 906 F. Supp. 357 (M.D. La. 1995); and (e) the operator of a "jetbridge," *Marlow v. AMR Serv. Corp.,* 870 F. Supp. 295 (D. Haw. 1994). 49 U.S.C. § 41713(b)(1) has been held to preempt claims against an air carrier's parent, *Cont'l Airlines, Inc. v. Am. Airlines,* 824 F. Supp. 689 (S.D. Tex. 1993), and claims made by air carriers against other air carriers. *See Mesa Airlines, Inc. v. Delta Air Lines, Inc.*, 219 F.3d 605 (7th Cir.), *cert. denied* 531 U.S. 1036 (2000); *Cont'l Airlines, Inc. v. United Airlines, Inc.*, 120 F. Supp.2d 556 (E.D. Va. 2000); *Cont'l Airlines, Inc. v. Am. Airlines,* 824 F. Supp. at 689.

The questions presented are (a) whether 49 U.S.C. § 41713(b)(1) is limited by consideration of against whom the claim is made and, if so, (b) what criteria are to be used to distinguish between persons against whom claims are preempted and persons against whom claims are not preempted.

Federal Courts Preempt Non-statutory State Law Tort Claims

Lower federal courts have found that 49 U.S.C. § 41713(b)(1) preempts business tort claims. *Mesa Airlines,* 219 F.3d. at 605 (tortious interference with contractual relations, breach of fiduciary relations and fraudulent inducement); *Cont'l Airlines, Inc. v. United Airlines, Inc.*, 120 F. Supp.2d at 556 (tortious interference with contractual relations and with prospective economic advantage);

Lyn-Lea Travel Corp., 283 F.3d at 282 (tortious interference with business relationships, fraud, and violations of the Texas Deceptive Trade Practices Act); *Cont'l Airlines, Inc. v. Am. Airlines*, 824 F. Supp. at 689 (tortious interference with business relations and unfair competition).

The question presented is whether 49 U.S.C. § 41713(b)(1) preempts business tort claims which relate to the "prices, routes and services" of an air carrier.

Frequent Flyer Depot Subject to 49 U.S.C. § 41713(b)(1)

Assuming that the provisions of 49 U.S.C. § 41713(b)(1) are not to be read to preempt claims against any person "related in anyway to the price, route, or service of an air carrier," distinctions must be made that warrant the application and non-application of 49 U.S.C. § 41713(b)(1) to state law claims made against particular persons. The Transportation Department's regulations make distinctions among types of air carriers and define "certificate air carriers," "direct air carriers," "foreign air carriers," and "indirect air carriers." 14 C.F.R. § 380.2. With persons such as Frequent Flyer Depot and similar service providers, another pertinent distinction between persons against whom state law claims are and are not preempted might be whether the person is subject to regulation under 49 U.S.C. § 41712(a), which gives the Secretary of Transportation authority over the conduct of air carriers, foreign air carriers and ticket agents.

Lower federal court have concluded that the term "air carrier" is not limited to certificated air carriers. *See Lyn-Lea Travel Corp. v. Am. Airlines, Inc.; Monarch Travel Servs. v. Assoc'd. Cultural Clubs*, 466 F.2d 552 (9th Cir. 1972) *cert. denied*, 410 U.S. 967 (1973); *Huntleigh Corp. v. La. State Bd. of Private Sec. Exam'rs*; *Marlow v. AMR Serv. Corp.*; *ABC Charters, Inc. v. Bronson*, 591 F.Supp 2d at 1299; *Arkin v. Trans Int'l, Inc.*, 568 F. Supp. 11, 13 (E.D.N.Y. 1982); *Ill. Corporate Travel, Inc. v. Am. Airlines, Inc.*, 682 F. Supp. 378, 380 (N.D. Ill. 1998) 49 U.S.C. § 40102(a)(45), defining ticket agents, demonstrates Congressional recognition that air transportation involves more than just the air carriers. Frequent Flyer Depot provides services related to obtaining tickets for travelers as does a company providing computer reservation and each can be deemed to be "air carrier" under 49 U.S.C. § 40102(a)(2) or "ticket agent" under 49 U.S.C. § 40102(a)(45). *See Lyn-Lea Travel Corp. v. Am. Airlines, Inc.*[6]

In *Morales* and *Wolens*, the Court considered 49 U.S.C. § 41713(b)(1) in conjunction with the Transportation Secretary's 49 U.S.C. § 41712(a) authority over "an unfair or deceptive practice or an unfair method of competition in air transportation or the sale of air transportation." The relationship between 49 U.S.C. § 41713(b)(1) and 49 U.S.C. § 41712(a) is manifest. Laws and regulations related

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[6] The distinction between ticket agents and air carriers is mutually exclusive, 49 U.S.C. § 40102(a)(45), but no case authority seems to have addressed the distinction. Perhaps the lack of distinction arises from the fact that, in the context of either finding, the result would be the same with regard to the 49 U.S.C. § 41713(b)(1) preemption.

to an air carrier's prices, routes or services perforce relate to the way an air carrier competes with other carriers and its practices towards its customers. *Morales*, 504 U.S. at 378-9; *Wolens*, 513 U.S. at 222.

The possible distinction based on 49 U.S.C. § 41712(a) does not preclude preemption of American's claims made against Frequent Flyer as 49 U.S.C. § 41712(a) applies both to Frequent Flyer and American. American alleges that Frequent Flyer assisted AAdvantage members to violate the AAdvantage terms. (Pet. App. 36A-40A). American alleges that Frequent Flyer unfairly competed with American by engaging in commerce with Miles and engaged in unfair and deceptive trade practices against AAdvantage members by brokering the purchase and sale of Miles.[7] (Pet. App. 36A-52A).

By brokering Miles, making reservations and purchasing airline tickets with Miles, Frequent Flyer Depot, Inc. and the Pirkles are either an "indirect air carriers" or a "ticket agents" who "sell, offer for sale, negotiate for, or hold [themselves] out as selling, providing, or arranging for, air transportation." (Pet. App. 81A-82A). In either event, both 49 U.S.C. § 41712(a) and 49 U.S.C. § 41713(b)(1) apply to their activities.

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[7] American Airlines does not have standing to complain of alleged wrongs committed against AAdvantage members. Kowalski v. Tesmer, 543 U.S. 125, 129 (2004) ("We have adhered to the rule that a party "generally must assert his own legal rights and interests, and cannot rest his claim to relief on the legal rights or interests of third parties.")

The Texas Court of Appeals' Reasoning

The Texas Court of Appeals held that, because American seeks to enforce restrictions it imposes on AAdvantage members, enforcing those restrictions against third persons through recourse to business tort law does not constitute imposition of state law on the prices, routes or services of an air carrier. *Frequent Flyer Depot, Inc. v. Am. Airlines, Inc.*, 281 S.W.3d at 221-2. Citing *Wolens*, the Texas Court of Appeals concluded that, since obligations assumed by American can be enforced, obligations imposed by American on AAdvantage members can be enforced against third persons who have no privity of contract with American. *Id.* Frequent Flyer voluntarily assumed no obligations to American. American seeks to impose obligations on Frequent Flyer. The distinctions between *Wolens* and this case are that Frequent Flyer Depot assumed no obligations and the preempted obligations in *Wolens* were in a statute and in this case the obligations are created and enforced by common law. The lower court's analysis simply provides no basis for concluding that, since American's assumed obligations are not preempted, the obligations American seeks to impose on third persons similarly are not preempted.

Equal Protection in Application of Preemption Statute

American and Frequent Flyer Depot are both subject to the provisions of Air Deregulation of 1978, as amended; thus, statutes, case law and analysis which preempt claims against air carriers should apply equally to American's claims against Petitioners. U.S. Const. amend. XIV; *Lawrence v.*

Texas, 539 U.S. 558, 579 (2003); *Lehr v. Robertson*, 463 U.S. 248, 265 (1983):

> The concept of equal justice under law requires the State to govern impartially. *N.Y. City Transit Auth. v. Beazer*, 440 U.S. 568, 587 (1979). The sovereign may not draw distinctions between individuals based solely on differences that are irrelevant to a legitimate governmental objective. *Reed v. Reed*, 404 U.S. 71, 76 (1971).

Any distinctions that might be drawn between American and the Petitioners under the Airline Deregulation Act of 1978 are irrelevant.

CONCLUSION

Neither the clear language of the statute nor case authority support the conclusion that 49 U.S.C. § 41713(b)(1) preempts claims against American Airlines but does not preempt claims against Frequent Flyer Depot, Inc., George Pirkle and Robert Pirkle. That result would create distinctions between air carriers and others that would change 49 U.S.C. § 41713(b)(1) into an airline protection statute rather than part of Congress' statutory scheme to advance competition in air transportation. Failure to preempt common law as well as statutory law under 49 U.S.C. § 41713(b)(1) would create a distinction that would strip the 49 U.S.C. § 41713(b)(1) preemption of meaning and exalt form over substance.

Frequent Flyer Depot, Inc., George Pirkle and Robert Pirkle pray that the Court reverse the lower

courts' judgments on the ground that 49 U.S.C. § 41713(b)(1) preempts American's claims against the Petitioners and direct the entry of orders and judgments in accordance with this Court's ruling.

Respectfully submitted,

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TEXAS SUPREME COURT

NO. 09-0240

FREQUENT FLYER DEPOT, INC.,
GEORGE PIRKLE AND ROBERT PIRKLE

APPELLANTS

V.

AMERICAN AIRLINES, INC.

APPELLEE

FROM THE 2ND DISTRICT COURT OF APPEALS
AND THE 67TH DISTRICT COURT OF TARRANT
COUNTY

OCTOBER 9, 2009

PETITION FOR REHEARING DENIED

TEXAS SUPREME COURT

NO. 09-0240
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AND THE 67TH DISTRICT COURT OF TARRANT
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AUGUST 21, 2009

PETITION FOR REVIEW DENIED

COURT OF APPEALS

SECOND DISTRICT OF TEXAS

FORT WORTH

NO. 2-08-386-CV

FREQUENT FLYER DEPOT, INC.,
APPELLANTS
GEORGE PIRKLE, AND ROBERT PIRKLE

V.

AMERICAN AIRLINES, INC.
APPELLEE

FROM THE 67TH DISTRICT COURT OF
TARRANT COUNTY

OPINION

This is an accelerated interlocutory appeal from the imposition of a temporary injunction prohibiting appellants Frequent Flyer Depot, Inc. and its officers and owners, George and Robert Pirkle, from engaging in the brokering, purchase, sale, bartering, and solicitation of American Airlines AAdvantage® rewards points. Appellants challenge the injunction on seven grounds: the underlying suit is pre-empted

by federal law; the injunction does not preserve the status quo; there is no enforceable contract between American and its AAdvantage® members prohibiting members from selling their rewards points to third parties; the hearing on the temporary injunction should have been continued for appellants to obtain discovery on their antitrust-related counterclaims; American failed to show an imminent injury; American has an adequate remedy; and principles of equity bar the imposition of an injunction. Because we conclude that there is no reversible error on any of these grounds, we affirm.

Background

Frequent Flyer admittedly brokers the purchase and sale of airline frequent flyer miles and awards, including AAdvantage® rewards points issued by American to its AAdvantage® members. The Pirkles are officers and owners of Frequent Flyer. American sued appellants and other similar brokers and their principals, contending that the brokering, purchase, bartering, and sale of AAdvantage® rewards is improper. Among its claims against appellants are claims for tortious interference with contract, tortious interference with prospective relations, misappropriation, and fraud. American also asserted a breach of contract claim against Robert Pirkle. After filing suit, American sought and obtained a temporary injunction prohibiting appellants from buying, selling, bartering, or soliciting AAdvantage® rewards during pendency of the suit.

Standard of Review

To be entitled to a temporary injunction, the applicant must plead a cause of action and further show both a probable right to recover on that cause of action and a probable, imminent, and irreparable injury in the interim. Butnaru v. Ford Motor Co., 84 S.W.3d 198, 204 (Tex. 2002); Argyle ISD ex rel. Bd. of Trustees v. Wolf, 234 S.W.3d 229, 236 (Tex. App. -- Fort Worth 2007, no pet.); Fox v. Tropical Warehouses, Inc., 121 S.W.3d 853, 857 (Tex. App. -- Fort Worth 2003, no pet.). A probable right of recovery is shown by alleging a cause of action and presenting evidence tending to sustain it. Wolf, 234 S.W.3d at 236; Fox, 121 S.W.3d at 857. An injury is irreparable if damages would not adequately compensate the injured party or if they cannot be measured by any certain pecuniary standard. Butnaru, 84 S.W.3d at 204; Wolf, 234 S.W.3d at 236; Fox, 121 S.W.3d at 857.

In an appeal from an order granting or denying a temporary injunction, the scope of review is restricted to the validity of the order granting or denying relief. Walling v. Metcalfe, 863 S.W.2d 56, 58 (Tex. 1993); Wolf, 234 S.W.3d at 237; Fox, 121 S.W.3d at 857. Whether to grant or deny a request for a temporary injunction is within the trial court's discretion, and we will not reverse its decision absent an abuse of discretion. Butnaru, 84 S.W.3d at 204; Wolf, 234 S.W.3d at 237; Fox, 121 S.W.3d at 857. Accordingly, when reviewing such a decision, we must view the evidence in the light most favorable to the trial court=s order, indulging every reasonable inference in its favor, and determine whether the order was so arbitrary that it exceeds the bounds of reasonable discretion. Wolf, 234 S.W.3d at 237; Fox, 121 S.W.3d at 857. A trial court does not abuse its

discretion if it bases its decision on conflicting evidence and at least some evidence in the record reasonably supports the trial court's decision. Davis v. Huey, 571 S.W.2d 859, 862 (Tex. 1978); Wolf, 234 S.W.3d at 237; Fox, 121 S.W.3d at 857. When findings of fact are not requested or separately filed, as in this case, we must uphold the trial court's order on any legal theory supported by the record. Mabrey v. SandStream, Inc., 124 S.W.3d 302, 309 (Tex. App. -- Fort Worth 2003, no pet.).

Pre-emption Claim

Appellants first contend that American's noncontract claims against them are pre-empted by the Airline Deregulation Act of 1978 (ADA), which provides, in part, that "[e]xcept as provided in this subsection, a State, political subdivision of a State, or political authority of at least 2 States may not enact or enforce a law, regulation, or other provision having the force and effect of law related to a price, route, or service of an air carrier that may provide air transportation under this subpart." 49 U.S.C.A. 41713(b)(1) (West 2007). The United States Supreme Court has held that threatened enforcement by state attorneys general of "fare advertising guidelines" was pre-empted by the ADA. Morales v. Trans World Airlines, Inc., 504 U.S. 374, 391, 112 S. Ct. 2031, 2041 (1992). The Court has also held that claims brought by AAdvantage® members against American in state court alleging violations of Illinois's Consumer Fraud Act were pre-empted by section 41713(b)(1). Am. Airlines, Inc. v. Wolens, 513 U.S. 219, 226, 115 S. Ct. 817, 823B24 (1995).

Appellants allege that this suit likewise involves an attempt to regulate prices, routes, or services that is pre-empted by the Act. American counters that any suit brought against it attempting to apply standards to its AAdvantage® program would be pre-empted as an attempt to place state regulations upon prices, routes, or services but that any attempt by it to enforce via state law its own standards as to prices, routes, or services, including frequent flyer mile credits, is not pre-empted as impermissible state regulation. We agree with American.

In Morales, the Court considered the effect the advertising restrictions would have on airlines' fares, holding that the restrictions would curtail the airlines' ability to communicate their fares to customers. Morales, 504 U.S. at 389, 112 S. Ct. at 2039B40. But it also held that "[s]ome state actions may affect [airline fares] in too tenuous, remote, or peripheral a manner to have pre-emptive effect." Id. at 391, 112 S. Ct. at 2040.

The Court further distinguished contract actions in Wolens, holding that the Act does not shelter airlines from suits "seeking recovery solely for the airlines' alleged breach of its own self-imposed undertakings." Wolens, 513 U.S. at 228, 115 S. Ct. at 824. Although concluding that the Act pre-empted AAdvantage® members' Illinois Consumer Fraud Act claims because mileage credits are akin to "rates," the Court nevertheless held that as to contracts affecting such mileage credits, "[m]arket efficiency requires effective means to enforce private agreements." Id. at 230, 115 S. Ct. at 824.

After Morales and Wolens, courts have held that certain personal injury causes of actions against airlines are not pre-empted by the Act. See, e.g., Hodges v. Delta Airlines, Inc., 44 F.3d 334, 340 (5th Cir. 1995); Continental Airlines v. Kiefer, 920 S.W.2d 274, 283 (Tex. 1996). In explaining its decision in Kiefer, the Texas supreme court noted that, "as Wolens explains at some length, claims are not [pre-empted] if they do not involve the enforcement of policy-laden state law that too closely approaches a regulatory effect on airlines." Kiefer, 920 S.W.2d at 283.

Here, although American has brought mostly tort claims, those claims attempt to protect the vitality of its self-imposed obligations: those arising from the AAdvantage® program. American's invoking the benefits and protections of state law to protect its own agreements does not have the same impermissible regulatory effect upon prices, routes, or services that Congress was concerned with in enacting section 41713(b)(1). The Act was intended to pre-empt only those state actions having a regulatory effect upon the airlines rather than to preclude airlines from seeking the benefits and protections of state law to enforce their self-imposed standards, regulations, and contracts. See id. ("[T]he purpose of ADA preemption is not to absolve airlines from all liability under state law, but to prohibit state regulation of air carriers, direct or indirect. Congress' concern was 'that the States would not undo federal deregulation with regulation of their own.'"); see also Hodges, 44 F.3d at 337 ("Following deregulation, the CAB's [the former Civil Aeronautics Board's] statements implementing the ADA strongly support the view that the ADA was

concerned solely with economic deregulation, not with displacing state tort law."). Indeed, denying American access to state courts for such purposes would seem to have such an impermissible regulatory effect.

Appellants contend that it is unfair to allow the airlines unfettered access to the state courts to enforce their own standards related to frequent flyer programs while denying access to the state courts to the states themselves and other parties attempting to impose standards on the airlines under state law. But the fairness of this application is not for us to decide; we must abide by Congress's intentions when determining whether a suit is pre-empted by the Act. See Morales, 504 U.S. at 383, 112 S. Ct. at 2036 (noting that in determining whether a suit is pre-empted under the Act, the question is one of statutory intent, and we must "begin with the language employed by Congress and the assumption that the ordinary meaning of that language accurately expresses the legislative purpose").

We conclude and hold that American's suit against appellants is not pre-empted by section 41713 of the Act. We overrule appellants' first issue.

Status Quo

In their second issue, appellants contend that the injunction fails to preserve the status quo. According to appellants, they have been operating their business since 2002; they allege that American has known about their activities since that time, or at least since the beginning of the lawsuit. Appellants claim that because American knowingly allowed

their activities to continue for some time, the last peaceable uncontested status is to allow appellants to continue their business.

The purpose of a temporary injunction is to preserve the status quo until a trial on the merits. Butnaru, 84 S.W.3d at 204; Wolf, 234 S.W.3d at 237; Fox, 121 S.W.3d at 857. "Status quo is defined as 'the last, actual, peaceable, noncontested status which preceded the pending controversy.'" Universal Health Servs., Inc. v. Thompson, 24 S.W.3d 570, 577 (Tex. App. -- Austin 2000, no pet.) (quoting Transp. Co. v. Robertson Transps., Inc., 152 Tex. 551, 261 S.W.2d 549, 553B54 (1953)); see Wolf, 234 S.W.3d at 237.

George Pirkle testified at the temporary injunction hearing that an attorney for American called him "several times" in 2002 about domain names connected to Frequent Flyer's website, frequentflyerdepot.com. The attorney told George that those domain names constituted trademark infringement and that American wanted them back. George told the attorney that the domain names were connected to frequentflyerdepot.com, and he agreed to give them to American. Although George testified that the attorney did not tell him to stop operating frequentflyerdepot.com, he also admitted that he could not recall whether they had talked about Frequent Flyer's brokerage business. He also said that the lawyer never told him that American would permit Frequent Flyer to sell AAdvantage® miles.

Since 2005, American has stopped travel on tickets sold by Frequent Flyer by freezing the accounts of

AAdvantage® members who American discovers have improperly sold their rewards points to a third party. But George Pirkle admitted that American successfully discovers and stops travel on Frequent Flyer's transactions only between about three and four to ten percent of the time. American's representative testified that these "policing" efforts are disruptive, causing operational difficulties for American and diverting resources away from legitimate ticketing.

When American deposed George Pirkle as the designated representative of Frequent Flyer,[1] he admitted that Frequent Flyer "brokers" AAdvantage® rewards points; in other words, Frequent Flyer buys rewards points from AAdvantage® members and sells those points to third parties. He agreed that American had asked Frequent Flyer to stop doing so "earlier this year [2008]," and he confirmed that Frequent Flyer had refused. American sought the temporary injunction hearing shortly after taking appellants' depositions.

If, as American claims, appellants' activities are in violation of its agreements with AAdvantage® members, [2] the last peaceable, noncontested status is for appellants to refrain from selling AAdvantage® rewards points. There is no evidence that American knew of Frequent Flyer's brokering activities in 2002 when its attorney contacted George Pirkle about the domain names; as George himself testified, he bought around 136 domain names when he started. Likewise, there is no evidence that American knew in 2005 and later that the AAdvantage® accounts it was freezing for the improper sale of rewards points were sold through Frequent Flyer in particular.[3] Even so, it is a reasonable inference that American

could not have known the full extent of Frequent Flyer's activities, considering George's testimony that Frequent Flyer transactions were "caught" only between three to ten percent of the time.
American moved for a temporary injunction when it learned the full extent of Frequent Flyer's activities and Frequent Flyer refused to discontinue those activities even in the face of American's suit.
American should not be denied its ability to obtain injunctive relief to which it is otherwise entitled simply because it took some time for it to discover Frequent Flyer's admittedly concealed activity. See Sharma v. Vinmar Int'l, Ltd., 231 S.W.3d 405, 428B29 (Tex. App. -- Houston [14th Dist.] 2007, no pet.) (holding that complete preservation of status quo in case involving improper use of trade secrets to operate competing chemical sales company was that new company would not be able to sell any of the disputed chemicals). We hold that the trial court's injunction properly preserves the status quo pending resolution of the suit. Accordingly, we overrule appellants' second issue.

Enforceability of Agreement Between American and AAdvantage® Members

Appellants contend in their third issue that there is no evidence that American has a binding contract with its AAdvantage® members such that appellants' actions in buying and selling, and inducing AAdvantage® members to buy and sell, AAdvantage® rewards points are improper as alleged by American in its tort claims.
To become an AAdvantage® member, a person must agree to American's online User Agreement, which contains the following provision: "At no time may

AAdvantage® mileage credit or award tickets be purchased, sold or bartered. Any such mileage or tickets are void if transferred for cash or other consideration." The User Agreement also contains other provisions allowing American to change the terms of the AAdvantage® program, upon which appellants base their claim that the User Agreement lacks mutuality and is, therefore, unenforceable. Specifically, the User Agreement states that American may, in its discretion, change the AAdvantage® program rules, regulations, travel awards, and special offers at any time with or without notice. . . . American Airlines may make one or more of [certain enumerated] changes at any time even though such changes may affect your ability to use the mileage credit or awards that you have already accumulated. American Airlines reserves the right to end the AAdvantage® program with six months notice.[4]

According to appellants, this clause shows a fatal lack of mutuality, rendering the entire agreement unenforceable.

A bilateral contract is one in which there are mutual promises between two parties to the contract, each being both a promisor and a promisee. Hutchings v. Slemons, 141 Tex. 448, 174 S.W.2d 487, 489 (1943); The Colony, Tex. v. N. Tex. Mun. Water Dist., 272 S.W.3d 699, 725 (Tex. App. -- Fort Worth, no pet. h.). A bilateral contract must be based upon a valid consideration, in other words, mutuality of obligation. Fed. Sign v. Tex. S. Univ., 951 S.W.2d 401, 409 (Tex. 1997); The Colony, 272 S.W.3d at 725. Consideration may consist of either benefits or detriments to the contracting parties; it may consist

of some right, interest, profit, or benefit that accrues to one party, or alternatively, of some forbearance, loss, or responsibility that is undertaken or incurred by the other party. The Colony, 272 S.W.3d at 725; In re C & H News Co., 133 S.W.3d 642, 647 (Tex. App. -- Corpus Christi 2003, orig. proceeding). The existence of a written contract presumes consideration for its execution. The Colony, 272 S.W.3d at 725; Doncaster v. Hernaiz, 161 S.W.3d 594, 603 (Tex. App. -- San Antonio 2005, no pet.). A contract that lacks mutuality of obligation is illusory and void and thus unenforceable. The Colony, 272 S.W.3d at 725; Tex. S. Univ. v. State St. Bank & Trust Co., 212 S.W.3d 893, 914 (Tex. App. -- Houston [1st Dist.] 2007, pet. denied). A promise is illusory when it fails to bind the promisor who retains the option of discontinuing performance without notice. Light v. Centel Cellular Co. of Tex., 883 S.W.2d 642, 645 (Tex. 1994); The Colony, 272 S.W.3d at 725; Rogers v. Alexander, 244 S.W.3d 370, 382 (Tex. App. -- Dallas 2007, no pet. h.). But mutuality in each clause of a contract is not required when consideration is given for the contract as a whole. Howell v. Murray Mortgage Co., 890 S.W.2d 78, 87 (Tex. App. -- Amarillo 1994, writ denied).

The test for mutuality is applied and determined when enforcement is sought, not when the promises are made. Hutchings, 174 S.W.2d at 489; Cherokee Commc'ns, Inc. v. Skinny's, Inc., 893 S.W.2d 313, 316 (Tex. App. -- Eastland 1994, writ denied). Accordingly, even if an illusory promise renders a contract unilateral, consideration can still be established by part performance by the promisee. Hutchings, 174 S.W.2d at 489; Cherokee Commc'ns, 893 S.W.2d at 316; cf. Alex Sheshunoff Mgmt. Servs.,

L.P. v. Johnson, 209 S.W.3d 644, 650-51 (Tex. 2006) (distinguishing general rule as to covenants not to compete, which, by statute, must be enforceable when entered into).

Here, the clause pointed to by appellants allows American to terminate the program upon notice and allows American to change the terms of the program with or without notice. However, that does not mean American is without obligation to its members under the User Agreements. In consideration for AAdvantage® members' purchasing paid travel on American and its partner airlines, and purchasing other services from specified providers, American agrees to provide rewards points to those customers. It is nonsensical for appellants to argue that no enforceable agreement exists when their entire business depends on the enforceability of that agreement. In other words, if American has no obligation to issue a ticket in exchange for rewards points when an AAdvantage® member fully complies with the User Agreement, appellants are ill-positioned to complain about the trial court's enjoining their activities, which depend on American's complying with its obligation even when a ticket is obtained in violation of the applicable User Agreement. Appellants cannot have it both ways. Additionally, as appellants point out in their brief, American's misappropriation claim "as alleged requires a showing that [appellants] 'wrongfully[]obtained award tickets.'" The key word here is "obtained," in the past tense. It is undisputed that American has issued tickets in exchange for rewards points purchased through Frequent Flyer. With regard to those tickets, then, American has performed under the applicable User Agreements.

Thus, even if American's consideration was illusory when it entered into the applicable User Agreements, its subsequent performance under those agreements established consideration, rendering those agreements enforceable. See Hutchings, 174 S.W.2d at 489; Cherokee Commc'ns, 893 S.W.2d at 316.

The same holds true for tickets that American will issue in exchange for rewards points in the future. If American does not issue any such tickets, then the question of whether American can enforce the no-sale rule is moot. But if American does issue tickets in exchange for rewards points acquired through purchase or barter-then it will again have partially performed under the User Agreements at issue, thus establishing the necessary consideration to render those agreements enforceable. See Hutchings, 174 S.W.2d at 489; Cherokee Commc'ns, 893 S.W.2d at 316.[5]

For these reasons, we conclude and hold that American's AAdvantage® User Agreements do not fail for lack of mutuality, and we overrule appellants' third issue.

Continuance

In their fourth issue, appellants claim that the trial court abused its discretion by refusing to continue the temporary injunction hearing.

Appellants moved for a continuance both before and after the temporary injunction hearing on the ground that American had refused to produce documents in response to appellants' Third Request for Production. Appellants requested these documents in conjunction

with their counterclaims against American for interference with contractual and business relations, tortious interference with prospective relations, a declaratory judgment that appellants' actions in purchasing and selling AAdvantage® rewards points are not improper, violations of the Texas Free Enterprise Act, violations of the DTPA, and injunctive relief. In particular, appellants claimed they needed additional discovery on their antitrust claims, their equitable defenses, and whether American had an adequate remedy at law. The gist of appellants' counterclaims is that American is a competitor and is unlawfully attempting to restrict their ability to maintain a competing business. Appellants' complaint fails initially because they failed to support their written motion for continuance with an affidavit as required by rule 251. Tex. R. Civ. P. 251. Generally, when a movant fails to comply with rule 251, we presume the trial court did not abuse its discretion by denying a motion for continuance. Villegas v. Carter, 711 S.W.2d 624, 626 (Tex. 1986); Sw. Country Enters., Inc. v. Lucky Lady Oil Co., 991 S.W.2d 490, 493 (Tex. App. -- Fort Worth 1999, pet. denied); see also Tri-Steel Structures, Inc. v. Baptist Found. of Tex., 166 S.W.3d 443, 448B49 (Tex. App. -- Fort Worth 2005, pet. denied) (holding that trial court did not abuse its discretion by denying motion for continuance when not in proper "affidavit form").

Appellants did not comply with rule 251; thus, we conclude and hold that the trial court did not abuse its discretion by denying their motion for continuance. Moreover, if necessary to protect a proven legal right, a temporary injunction may issue even if it has the effect of restraining competition, so

long as it is narrowly tailored to preserve the status quo. Sharma, 231 S.W.3d at 428B29 ("While ordinarily a temporary injunction should operate as a corrective rather than a punitive measure, when a choice must be made between a failure to provide adequate protection of a recognized legal right and the punitive operation of the writ, the latter course must be taken."). We overrule appellants' fourth issue.

Proof of Injury

Appellants' fifth issue complains that American failed to meet its burden to prove that it was injured. American alleged that it is injured by Frequent Flyer's actions because customers who purchase void rewards points from appellants (because those purchases violate the no-sale rule) would likely have purchased tickets from American had they not obtained the void tickets; thus, those customers likely displaced other AAdvantage® members or other paying American customers who would have purchased tickets had the seats not been occupied by travelers using the void tickets. American also alleged that it lost goodwill with AAdvantage® members in that those members were prevented from using their AAdvantage® rewards points because seats were occupied by persons using the void tickets. Appellants contend that American "offered no evidence of any identified passenger, actual or potential, who suffered any aspect of [American's] litany of claimed injuries."

A party proves irreparable injury for injunction purposes by proving that damages would not adequately compensate the party or cannot be

measured by any certain pecuniary standard. Butnaru, 84 S.W.3d at 204; Fox, 121 S.W.3d at 857. An injunction is not proper when the claimed injury is merely speculative, however; fear and apprehension of injury are not sufficient to support a temporary injunction. Jordan v. Landry=s Seafood Rest., Inc., 89 S.W.3d 737, 742 (Tex. App. -- Houston [1st Dist.] 2002, pet. denied) (op. on reh'g). American offered the testimony of Jim Balsom, Manager of AAdvantage® systems and partner support. He testified without objection that American is reluctant to challenge the veracity of AAdvantage® members' representations when booking travel because "that would not engender goodwill[;] in fact, [it would] probably cost [American] significant goodwill if we were to do that." Additionally, he testified that such an inquiry "[w]ould take [a] significant amount of time and add significantly to [American's] costs."

Balsom further testified that brokering operations such as Frequent Flyer's "cause[] customers to question [American's] ability to manage and maintain the program and deliver the benefits that we've promised to customers." He said that when American discovers a void transaction due to Frequent Flyer's activities, its business is disrupted and it must divert resources away from legitimate customers to deal with the void transactions. He also testified that freezing the AAdvantage® accounts at issue causes ill will for the member. Balsom further stated that dealing with these types of transactions causes "operational difficulties or issues."

Regarding displacement, Balsom testified that when Frequent Flyer sells an AAdvantage® member's

rewards points to a third party, that third party displaces a customer "who would either pay cash for that ticket or . . . who would redeem AAdvantage® miles for the seat." He said it also "does use resources through [American's] reservations office [and] potentially AA.com for other business purposes" instead of valid ticket sales.

Appellants challenge American's displacement evidence, pointing to Securities and Exchange Commission reports filed by AMR, American's parent company, showing that, generally, between 2003 and 2007, twenty to thirty percent of seats on American's flights were empty. It also points to statements in those reports to the effect that, with respect to the AAdvantage® program, AMR "believes displacement of revenue passengers is minimal given the Company's load factors, its ability to manage frequent flyer inventory, and the relatively low ratio of free award usage to total passengers boarded." According to appellants, absent evidence from specific flights on which displacement occurred, American cannot overcome this evidence of empty seats on its flights.

The SEC filings do not give information for specific flights; indeed, the vacancies in paying seats may be higher due to higher numbers of business travelers paying a lower price for rewards points tickets through Frequent Flyer than paying for typical full-fare seats.[6] And the isolated statement that displacement is minimal is clearly in relation to the function of the program according to its guidelines; in other words, passenger displacement is minimal when the program is operating without outside influences.

American points to additional evidence as supporting the proof of injury requirement, such as the fact that it is virtually impossible to police appellants' actions (when American discovers a void ticket, Frequent Flyer simply buys more miles and issues a new one), that American has to devote resources to investigating and policing appellants' actions that disrupt its operation and divert its resources from legitimate customers, and the unobjected-to evidence that American's inability to police activities such as Frequent Flyer's causes AAdvantage® members to question its ability to effectively run the program. Disruption to a business can be irreparable harm. Lavigne v. Holder, 186 S.W.3d 625, 629 (Tex. App. --- Fort Worth 2006, no pet.); David v. Bache Halsey Stuart Shields, Inc., 630 S.W.2d 754, 757 (Tex. App. -- Houston [1st Dist.] 1982, no writ) ("This harm would not only disrupt the organized business dealings of Bache but would also threaten customer confidence in Bache's handling of their private affairs, and probably cause Bache to lose not only customers but profits as well."). Moreover, assigning a dollar amount to such intangibles as a company's loss of clientele, goodwill, marketing techniques, and office stability, among others, is not easy. Martin v. Linen Sys. for Hosps., Inc., 671 S.W.2d 706, 710 (Tex. App. -- Houston [1st Dist.] 1984, no writ).

American offered specific, undisputed evidence of intangible harm to its business, including the AAdvantage® program, resulting from appellants' actions. Balsom's testimony was not speculative and is supported by the Pirkles' own testimony about Frequent Flyer's operations, specifically, its instructions to AAdvantage® members intended to conceal its activities from American.

We conclude and hold that American presented evidence of an irreparable injury. Thus, we overrule appellants' fifth issue.

Adequate Remedy

In their sixth issue, appellants claim that if American presented sufficient evidence to meet its burden of proof as to injury, that same evidence shows that American has an adequate remedy in damages. Specifically, appellants claim that damages can be calculated easily from AMR's SEC filings if American can provide the identity of specific displaced passengers. They also contend that American cannot show lost profits because it has not made any profit since at least 2002.
American counters that even if damages can be assigned to displaced passengers, appellants "do not refute the evidence . . . that their conduct disrupts American's business . . . in many ways and affects the reputation and loyalty it has developed over years with its customers."

An adequate remedy is one that is as complete, practical, and efficient to the prompt administration of justice as is equitable relief. Mabrey, 124 S.W.3d at 317. Damages are an inadequate remedy if they are difficult to calculate. Id. at 318-19.

According to American, while the evidence appellants point to may show that some of its damages are calculable, it does not show a way to calculate damages for American's claims of loss of goodwill and other intangibles. We agree. As we have already stated, the intangible types of injuries testified to by Balsom are the types of injuries to

which a dollar value may not easily be assigned. Martin, 671 S.W.2d at 710. A remedy is not adequate simply because some of the proven damages are calculable. See Tex. Indus. Gas v. Phoenix Metallurgical Corp., 828 S.W.2d 529, 532 (Tex. App. -- Houston [1st Dist.] 1992, no writ) ("For a legal remedy to be adequate, it must give the applicant complete, final, and equal relief."); see also Towers v. Grogan, No. 01-97-00946-CV, 1998 WL 191760, at *4 (Tex. App. -- Houston [1st Dist.] Apr. 23, 1998, no pet.) (not designated for publication) (holding that although some breach of contract damages were calculable, specific damages for which Grogan sought injunctive relief were intangibles, incapable of being measured by damages).

We conclude and hold that American proved that damages are not adequate to fully compensate it for its injuries. Accordingly, we overrule appellants' sixth issue.

Equitable Concerns

Appellants' seventh issue raises equitable claims, including laches and unclean hands.

Appellants first contend that American's temporary injunction claim is barred by laches because American has failed to take action against appellants despite knowing since 2002 the type of business Frequent Flyer was engaged in. Appellants claim Frequent Flyer has been prejudiced by American's inaction because the Pirkles never would have expanded the business since 2002 had they known American objected to Frequent Flyer's conduct.

A party asserting the defense of laches must show both an unreasonable delay by the other party in asserting its rights and harm resulting to it because

of the delay. Rogers v. Ricane Enters. Inc., 772 S.W.2d 76, 80 (Tex. 1989); In re Roxsane R., 249 S.W.3d 764, 771 (Tex. App. -- Fort Worth 2008, orig. proceeding). Here, we have already discussed the lack of evidence that American knew or should have known of appellants' activities when its lawyer contacted George Pirkle in 2002 about the domain names. In addition, we have also pointed to the evidence that Frequent Flyer purposefully concealed its dealings from American and instructed AAdvantage® members to do the same. Accordingly, we do not believe that the evidence shows that American deliberately slumbered on its rights with regard to appellants' conduct.

Moreover, there was evidence from which the trial court could have concluded that appellants failed to show prejudice; the trial court elicited testimony from George that Frequent Flyer's expansion also had to do with increased trade in other airlines' frequent flyer miles. George also testified that he had been aware of American's no-sale provision since at least 2005 because American had stopped travel on tickets bought with rewards points sold by Frequent Flyer before that time. Accordingly, we conclude and hold that the trial court did not abuse its discretion by rejecting appellants' claim of laches. Appellants contend that American has unclean hands because "the evidence shows that [American] is part of an illegal conspiracy with regard to the antitrust laws of the United States and the State of Texas." According to appellants, the temporary injunction prevents (and American's suit seeks to prevent) them from competing with American. Appellants also claim that American must do equity to obtain equity and that American has failed to do

so by authorizing Points.com and its airline partners to trade with members for AAdvantage® rewards points. This argument appears to incorporate appellants' antitrust and anticompetition claims. But as we have already held, an otherwise proper injunction will not be rendered improper by claims that such an injunction would have a preclusive effect on competition. See Sharma, 231 S.W.3d at 429. Thus, we conclude and hold that the trial court did not abuse its discretion by rejecting appellants' equitable defenses.

We overrule appellants' seventh issue.

Conclusion

Having overruled all of appellants' issues, we affirm the trial court's order granting the temporary injunction.

TERRIE LIVINGSTON
JUSTICE
PANEL: LIVINGSTON, DAUPHINOT, and MCCOY, JJ.

DELIVERED: February 26, 2009

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[1]American says in its brief that the depositions had been delayed due to George Pirkle's poor health; appellants do not dispute this.

[2]Appellants do not challenge on appeal whether American proved a probable right to recover on its causes of action.

[3]George and Robert both testified that Frequent Flyer instructs customers who purchase rewards points from it to tell American that the points are a gift and that such representations are lies.
[
4]The agreement also states that American "may amend its rules of the Program at any time without notice."

[5]Moreover, we note that, as a practical matter, American is effectively conceding the enforceability of the User Agreements. Appellants criticize American for relying on cases construing similar airline passenger incentive agreements because in those cases the passengers themselves-who were seeking to enforce the agreements-conceded the existence of enforceable agreements. See Mozingo v. Alaska Air Group, Inc., 112 P.3d 655, 661B62 (Alaska 2005); Grossman v. USAir, Inc., 33 Phila. Co. Rptr. 427, 431B32 (C.P. 1997). But the key factor that makes this case similar to those is that the party seeking enforcement-here, American-effectively concedes enforceability of the agreements by attempting to enforce them.

[6]As the United State Supreme Court noted in Morales,

> The expenses involved in operating an airline flight are almost entirely fixed costs; they increase very little with each additional passenger. The market for these flights is divided between consumers whose volume of purchases is relatively insensitive to price (primarily business travelers) and consumers whose demand is very price sensitive indeed (primarily pleasure travelers). Accordingly,

> airlines try to sell as many seats per flight as possible at higher prices to the first group, and then to fill up the flight by selling seats at much lower prices to the second group (since almost all the costs are fixed, even a passenger paying far below average cost is preferable to an empty seat). In order for this marketing process to work, and for it ultimately to redound to the benefit of price-conscious travelers, the airlines must be able to place substantial restrictions on the availability of the lower priced seats (so as to sell as many seats as possible at the higher rate), and must be able to advertise the lower fares.

504 U.S. at 389, 112 S. Ct. at 204

TEMPORARY INJUNCTION ORDER

No. 067-224132-07
IN THE JUDICIAL DISTRICT OF
TARRANT COUNTY, TEXAS
67TH JUDICIAL DISTRICT

AMERICAN AIRLINES, INC.
V.
FREQUENT FLYER DEPOT, INC.

TEMPORARY INJUNCTION ORDER

After review of the pleadings, evidence presented, case law cited, arguments of counsel and the Court's trial notes, the Court finds as follows:

1. Plaintiff American Airlines, Inc. is a commercial airline that has designed and implemented a frequent flyer program known as AAdvantage® to develop passenger loyalty and reward its best customers;
2. Customers who become members of the AAdvantage® program may accrue mileage credit by flying on American or its partners airlines and by other means. Members in the AAdvantage® program must abide by the Terms and Conditions of the program to maintain eligibility for its benefits. The AAdvantage® Terms and Conditions may be found in the AAdvantage® program application and on American's website, AA.com. The Terms and Conditions of the AAdvantage®

program prohibit the purchase, sale or barter of AAdvantage® mileage credit or award tickets;

3. Defendants Frequent Flyer Depot, Inc., George Pirkle, and Robert Pirkle are in the business of purchasing and selling AAdvantage® mileage credit and award tickets;

4. American produced evidence of and demonstrated a probable right of recovery against defendants Frequent Flyer Depot, Inc., George Pirkle, and Robert Pirkle on its claims of fraud, tortious interference with contract and misappropriation;

5. American has also shown that it will suffer immediate and irreparable loss, injury and damage if a temporary injunction does not issue before trial and that it has no adequate remedy at law; and

6. American has shown its willingness to post bond.

For the foregoing reasons, the Court ORDERS:

From the date of entry of this Temporary Injunction through the completion of trial of this matter defendants Frequent Flyer Depot, Inc., George Pirkle, Robert Pirkle, and their successors and assigns, and their respective officers, agents, affiliates, employees, and attorneys, and all persons in active concert or participation with any one or more of them, are enjoined and restrained from the following:

(a) Purchasing, brokering, or bartering AAdvantage® mileage credit or AAdvantage®) award tickets;

(b) Selling, offering for sale or providing any person AAdvantage® mileage credit or AAdvantage award tickets; and

(c) Soliciting any person for the actions prohibited in (a) and (b) above.

American will post bond in the amount of $100,000.00.

Final trial of this matter is set for the week beginning May 11, 2009.

This Temporary Injunction will remain in effect until further order of this Court, after trial on the merits of American's Petition or other final resolution of this matter.

IT IS SO ORDERED.

Signed this 19th day of September, 2008.

/s/ Donald Cosby
The Honorable Don Cosby

No. 067-224132-07

AMERICAN AIRLINES, INC.

V.

FREQUENT FLYER DEPOT, INC., GEORGE PIRKLE, ROBERT PIRKLE, LTS, LUXURY TOUR SOURCE, LTD., MUKESH KUMAR GOYAL, MAIN ST. TRAVEL CENTER OF MONSEY, INC., BEN WEBER, ISRAEL ODZE, and JOHN DOE I.

IN THE JUDICIAL DISTRICT OF TARRANT COUNTY, TEXAS 67TH JUDICIAL DISTRICT

PLAINTIFF'S THIRD AMENDED PETITION

Plaintiff American Airlines, Inc., through its attorneys, brings this action against defendants Frequent Flyer Depot, Inc., George Pirkle, Robert Pirkle, Luxury Tour Source, Ltd, Mukesh Kumar Goyal, Main St. Travel Center of Monsey, Inc., Ben Weber, Israel Odze, and John Doe I for damages and injunctive relief. Based upon actual knowledge with respect to itself and its own acts, and upon information and belief as to all other persons and matters, American respectfully alleges as follows:

Discovery Level

1. Based on the relief sought, discovery should be conducted under a Level 3 plan pursuant to Texas Rule of Civil Procedure 190.4.

Nature of the Action

2. This is a suit for damages and injunctive relief arising from unlawful sales of American's valuable property. Defendants are in business to profit from wrongfully targeting American's frequent flyer AAdvantage program, based and operated in this County. In so doing, they are undermining the program's objectives and causing American to transport passengers on its flights without compensation, by unlawfully selling award tickets procured with wrongfully obtained frequent flyer mileage credit.

Parties

3. American is a Delaware Corporation with its headquarters in this County, at 4333 Amon Carter Boulevard, Fort Worth, Texas 76155.

4. Defendant Frequent Flyer Depot, Inc. ("FFD") is a Texas corporation with its headquarters located at 164 Bushwhacker, Mabank, Texas 75156. It has been served with process and appeared in the suit. It owns and operates websites located at www.FrequentFlyerDepot.com, www.FrequentFlyerDepot.net, www.ffdintemational.com, www.ffdepot.com, and www.ffdepot.net.

5. Defendant George Pirkle is an individual whose office address is 164 Bushwhacker, Mabank, Texas 75156. He has been served with process and appeared in the suit. He is President and CEO of FFD.

6. Defendant Robert Pirkle is an individual whose office address is 164 Bushwhacker, Mabank, Texas 75156. He has been served with

process and appeared in the suit. He is an employee of FFD.

[Paragraphs 7 – 12 are omitted as they do not relate to the claims against Frequent Flyer defendants]

Jurisdiction and Venue

13. This Court has subject matter jurisdiction over this case because the amounts in controversy are within its jurisdictional limits.

14. This Court also has personal jurisdiction over defendants, who each has continuous and systematic contacts with Texas and who each committed torts and/or breached contracts in this State. The injuries they have inflicted and threaten to further inflict on American are felt in this State, and they know or should know that serious harmful effects from their conduct will and did occur here.

[Paragraphs 15 – 18 are omitted as they do not relate to the claims against Frequent Flyer defendants]

19. Venue in this matter is proper in this County, pursuant to Texas Civil Practice & Remedies Code § 15 .002. A substantial part of the activities, events, and damages giving rise to this lawsuit occurred in this County.

Damages

20. Subject to further discovery on the causes of action alleged against all defendants, at this time American seeks maximum actual damages from defendants Frequent Flyer Depot, Inc., George Pirkle and Robert Pirkle of $150,000, exclusive of attorney's fees, costs of suit, exemplary damages, and such pre- and post-judgment interest as may be allowed by law.

[Paragraphs 21 & 22 are omitted as they do not relate to the claims against Frequent Flyer defendants]

Facts Giving Rise to This Action

A. American's Efforts to Protect Its Property

23. Over the last 75 years, Fort Worth-based American has grown to be the largest commercial airline in the world, with the greatest number of passengers carried, the most revenue passenger miles flown, and the largest fleet of planes.

24. American's AAdvantage® frequent flyer program is designed to develop passenger loyalty and increase revenues by rewarding its best customers -- those who regularly fly American. It is the oldest and most used frequent flyer program in the industry. Membership is limited to individuals.

25. In exchange for adhering to the AAdvantage contract that sets out the rules governing the program and its members, members accrue mileage credit by flying on American or its

partner airlines, staying at hotel partners, renting a car from a partner company, or by other means. Mileage credit accrues only to the account of the member who flies, stays at a hotel, rents a car, or earns it by other lawful means. In consideration for accumulating specified amounts of mileage credit, members earn award tickets for free travel on American or its partner airlines, upgrades to a higher class of service, and other benefits. AAdvantage award tickets and upgrades may be issued in any name designated by the AAdvantage member at the time the request is made.

26. The AAdvantage contract is made available to members and the public in several written forms, including in the program application and on American's website, AA.com. The rules in the AAdvantage contract state, "accrued mileage credit and award tickets do not constitute property of the members." They belong to American. American protects them by prohibiting their purchase, sale, or barter and enforcing penalties for violations, a term known as the "No-Sale Rule." Specifically, (i) "Any such mileage or tickets are void if transferred for cash or other consideration"; (ii) "Use of award tickets that have been acquired by purchase or for any other consideration may result in the tickets being confiscated or the passenger being denied boarding"; and (iii) "If a trip has been started, any continued travel will be at the cost of a full fare ticket for any segments flown on a sold or bartered ticket."

27. American seeks to enjoin and recover damages resulting from defendants' widespread violations of the No-Sale Rule.

[Paragraphs 28 - 37 are omitted as they do not relate to the claims against Frequent Flyer defendants]

C. Defendant FFD's Wrongful Conduct

38. FFD is in business to broker the sale of AAdvantage mileage credit and award tickets from AAdvantage members to American's potential customers, all without compensation to American. It operates its business with knowledge that under the AAdvantage contract, neither mileage credit nor award tickets may be purchased, bartered, or sold, and that mileage and tickets are void if transferred for cash or other consideration. FFD's actions are calculated to target and injure the AAdvantage program.

39. FFD operates through the domain names www.FrequentFlyerDepot.com, www.FrequentFlyerDepot.net, www.ffdinternational.com, www.ffdepot.com, and www.ffdepot.net, which are the same website. The site announces, "Starting in Dallas, Texas, Frequent Flyer Depot has been in business since 1992." It "provides professional brokerage of all frequent flyer miles and mileage rewards worldwide." "We are the premiere online brokerage of frequent flyer tickets and mileage rewards" and "provide a secure service that allows travelers to buy and sell all frequent flyer tickets, mileage rewards, and upgrades."

40 . The website lists the price that FFD will pay for mileage credit, and Advantage mileage credit is its most valuable. It offers to pay "1.8 cents per mile on AA," more than any other domestic airline.

The website also lists the ticket prices for international travel. For example, a roundtrip ticket from the 48 States, Alaska, and Canada to Europe sells for $2695 for business class and $3695 for first class.

41. Despite knowledge of the No-Sale Rule, FFD's website misleads program members by stating: "Although airline policy discourages buying or selling miles, it is NOT against the law for you to buy or sell frequent flyer awards."

42. The website requests potential buyers and sellers to call, email, or fax FFD the type and amount of miles they wish to buy or sell. FFD matches a seller -- the AAdvantage member -- with a buyer -- American's potential customer. The AAdvantage member then uses his mileage credit to make a reservation with American in the name of the buyer, concealing the fact that the ticket will be sold. American, without knowledge of this fact, issues the requested award ticket. The buyer then wires money for the ticket to FFD's brokerage account, where it is held until FFD receives an E-ticket number or the hardcopy ticket from the seller. Upon receipt, FFD releases the buyer's money, minus its fee, to the seller via wire transfer. American incurs costs to transport the customer who paid FFD -- not American -- for the ticket. American receives no compensation in the transaction.

43. FFD has induced AAdvantage members -- including Texas residents -- to sell their mileage credit or award tickets to FFD, in violation of the No-Sale Rule; to contact American reservations -- including call centers in Texas -- to request issuance

of award tickets in the names of individuals to whom FFD has wrongfully sold the tickets; and to conceal from American their intention to sell their mileage credit and award tickets to FFD.

44. FFD has made misleading statements that induced those who purchased the wrongfully-obtained AAdvantage award tickets to believe that they had received valid airline tickets good for travel on American or its partner airlines, despite its knowledge that award tickets are void once purchased or sold.

45. Numerous individuals have traveled on American using void award tickets wrongfully sold by FFD. They likely would have purchased tickets from American had they not obtained the void award tickets from FFD. Furthermore, they likely displaced legitimate AAdvantage members or American customers who would have purchased tickets had the seats occupied by travelers with void award tickets been available.

46. By way of example, between May 21, 2005 and May 22, 2007, FFD bought 600,000 mileage credits from one AAdvantage member and induced him to cause American to issue six award tickets valued at almost $42,000 in consideration for his mileage, including four tickets routed through DFW International Airport.

47. FFD has wrongfully bought at least 860,000 AAdvantage mileage credits and fraudulently obtained at least nine award tickets valued at almost $70,000. American has paid to transport these passengers without compensation. In

addition, FFD purchased 440,000 in mileage credit and fraudulently obtained four award tickets that American did not honor for travel because its investigation determined that the tickets had been sold and thus were void.

48. American has lost goodwill with AAdvantage members prevented from obtaining free award travel on American because these seats were occupied by individuals using wrongfully-obtained tickets, and with the general public who paid higher prices to American for valid tickets than those offered by FFD for wrongfully-obtained tickets. American also has been forced to expend significant resources to investigate FFD's improper activities.

49. Because AAdvantage mileage credit and award tickets are highly valuable, and because FFD is in business solely to barter, purchase, and sell them, it is likely that FFD will continue its wrongful activities.

D. Defendants George and Robert Pirkle's Wrongful Conduct

50. FFD's business is built on targeting the AAdvantage program and profiting from violating its rules. George Pirkle is President and CEO of FFD. He has detailed knowledge of its wrongful operations and personally directed, authorized, and participated in them. Robert Pirkle is an officer or manager of FFD. He also has detailed knowledge of its wrongful operations and personally directed, authorized, and participated in them.

51. By way of example, on February 20, 2007, George Pirkle sent a letter by email to an AAdvantage member stating, "We are busy as ever here at Frequent Flyer Depot and always in need of large quantities of airline miles. The main airline miles we Broker are: American ..."

52. The Pirkles have misrepresented that American merely "discourages buying or selling miles," deliberately omitting the fact that it prohibits buying or selling miles.

53. In addition, in violation of the No-Sale Rule, Robert Pirkle wrongfully purchased an award ticket issued by American at the request of an AAdvantage member and used to it fly roundtrip from DFW International Airport.

54. Because AAdvantage mileage credit and award tickets are highly valuable, and because the Pirkles are directly involved in management of FFD, a business built on defrauding American, it is likely that they will continue to wrongfully barter and sell mileage credit and award tickets.

[Paragraphs 55 - 95 are omitted as they do not relate to the claims against Frequent Flyer defendants]

First Cause of Action
(Tortious Interference with Contract)

96. American realleges the material facts alleged in the preceding paragraphs.

97. The AAdvantage rules set forth the terms of a contract between American and AAdvantage members and govern the use of AAdvantage mileage credit and award tickets.

98. At all material times, defendants FFD, George Pirkle, Robert Pirkle, LTS, Goyal, Main St., Weber, Odze, and Doe I have known that the AAdvantage rules prohibit the sale of AAdvantage mileage credit and award tickets.

99. Defendants FFD, George Pirkle, Robert Pirkle, LTS, Goyal, Main St., Weber, and Odze acted with a willful desire and intent to hinder and interfere with, and are continuing to interfere with, American's contracts with AAdvantage members by inducing members to breach their contracts by selling mileage credit and/or award tickets and upgrades in violation of the program rules.

100. Doe I acted with a willful desire and intent to hinder and interfere with, and is continuing to interfere with, American's contracts with AAdvantage members by fraudulently depleting mileage credit and misappropriating award tickets from their accounts and selling these award tickets, hindering the members' performance of their contracts.

101. Defendants' interference has caused and continues to cause American to provide free air travel to passengers who were not entitled to it. The revenues that properly should have been received by American for transporting these passengers have been and continue to be wrongfully diverted to these defendants.

102. As a proximate result of defendants' tortious interference, American has suffered injury and damages, including being deprived of the benefits that the AAdvantage program was designed to engender, including passenger loyalty and revenues.

103. In addition, American has suffered and will continue to suffer irreparable harm, and its remedy at law is not itself adequate to compensate for injuries inflicted by defendants. In the absence of an injunction, defendants are likely to attempt to interfere with American's contract rights with additional AAdvantage members. Accordingly, American is entitled to injunctive relief.

Second Cause of Action
(Tortious Interference with Prospective Relations)

104. American realleges the material facts alleged in the preceding paragraphs.

105. The customers of defendants FFD, George Pirkle, Robert Pirkle, LTS, Goyal, Main St., Weber, Odze, and Doe I that flew on American by using void tickets likely would have entered into a business relationship with American. AAdvantage members who sought to travel on American, either by purchasing a ticket or by redeeming their mileage credit for award tickets they have earned, likely were not able to obtain tickets because passengers traveling on wrongfully-obtained award tickets occupied seats that American would have used to accommodate its AAdvantage customers. Other customers who desired to fly on American and sought

to purchase tickets from American or its authorized travel agents likely could not obtain tickets or services on American because passengers traveling on wrongfully-obtained award tickets occupied seats that American needed to accommodate paying customers.

106. These defendants wrongfully and intentionally interfered with American's reasonable expectation of these prospective contractual relationships.

107. The fraudulent misrepresentations of these defendants in wrongfully obtaining AAdvantage mileage credit and award tickets were independently tortious.

108. These defendants' tortious interference was the proximate cause of American's injury because their customers purchased wrongfully-obtained American tickets from them instead of from American and occupied seats that American would have used to accommodate its AAdvantage members or other paying customers.

109. American suffered actual damages due to interference by these defendants. They caused American to provide free air travel to customers who were not entitled to it, depriving it of revenue it could have earned by selling tickets to AAdvantage members or other paying customers, as well as of the customer loyalty and economic benefits that the AAdvantage program was designed to engender. Revenues that properly should have been received by American for transporting these defendants' customers, AAdvantage members, or other paying

customers have been wrongfully diverted to these defendants.

110. In addition, American has suffered and will continue to suffer irreparable harm, and its remedy at law is not itself adequate to compensate for injuries inflicted by defendants. In the absence of an injunction, defendants are likely to attempt to interfere with American's prospective relations with additional AAdvantage members and the general flying public. Accordingly, American is entitled to injunctive relief.

Third Cause of Action
(Misappropriation)

111. American realleges the material facts alleged in the preceding paragraphs.

112. American expends extensive labor, skill, and financial resources in operating its airline. Air transportation on American flights, the product created through these efforts and represented by American tickets, has substantial commercial value because American transports customers on flights throughout the globe.

113. Defendants FFD, George Pirkle, Robert Pirkle, LTS, Goyal, Main St., Weber, Odze, and Doe I compete with American by selling for valuable consideration wrongfully-obtained award tickets for American flights for which it receives no compensation, gaining a special advantage in that competition because these defendants are burdened with none of the expense incurred by American in operating its airline.

114. The conduct of these defendants causes commercial damages to American by diverting money paid for the wrongfully-obtained award tickets away from American and to these defendants and causing American to provide free air transportation to passengers who were not entitled to it and incur costs in providing such free air transportation.

115. In addition, American has suffered and will continue to suffer irreparable harm, and its remedy at law is not itself adequate to compensate for injuries inflicted by defendants. In the absence of an injunction, defendants are likely to attempt to misappropriate tickets for American flights. Accordingly, American is entitled to injunctive relief.

Fourth Cause of Action
(Fraud)

116. American realleges the material facts alleged in the preceding paragraphs.

117. Defendants FFD, George Pirkle, Robert Pirkle, LTS, Goyal, Main St., Weber, and Odze have concealed from American certain material facts. These defendants fraudulently obtained award tickets from American by calling, and directing their employees and AAdvantage members to call, American to make reservations in the names of passengers, knowing that these passengers would fly using void tickets because they would be sold. In addition, defendant Weber reached out to American to generate more business between American and Main St. but failed to disclose Main St.'s wrongful actions in fraudulently obtaining award tickets from

American. By failing to disclose these facts, defendants created a false impression with knowledge that American was ignorant of these facts and did not have an equal opportunity to discover them.

118. These defendants were deliberately silent when the false impression they made created a duty to speak. They failed to disclose these facts with the intent of inducing American to issue award tickets on behalf of their customers.

119. In justifiable reliance upon these defendants' nondisclosures, American issued hundreds of award tickets for free travel to passengers not entitled to it.

120. In addition, Doe I has made numerous material misrepresentations. He falsely represented that he was an AAdvantage member entitled to book award tickets on American. He misrepresented or failed to disclose numerous violations of the AAdvantage rules with the intent of inducing American to issue award tickets on behalf of his customers. These misrepresentations and omissions were material because American only will issue award tickets based on mileage credit from a member's account in response to a request from that member and in accordance with AAdvantage rules.

121. He made these misrepresentations knowing they were false statements. He made them to American with the intent that it would rely on them and provide his customers with AAdvantage award tickets to which they were not entitled and for which American would receive no payment. In

justifiable reliance upon his misrepresentations, American issued award tickets for free travel to passengers not entitled to it.

122. American has suffered damages because of defendants' nondisclosures and misrepresentations. It has incurred costs in providing free travel to passengers not entitled to it, including the cost it must pay its partner airlines to provide air travel to AAdvantage members using award tickets; lost revenue from providing free travel to passengers not entitled to it in lieu of selling tickets and service to those passengers and to other potential customers; lost goodwill with AAdvantage members who are entitled to free or upgraded travel on American but prevented from obtaining it because seats that would otherwise have been available are occupied by passengers with fraudulently obtained tickets; lost goodwill from the general flying public who wish to travel on American but are prevented from obtaining tickets because seats that would otherwise have been available are occupied by passengers with fraudulently obtained tickets; and lost goodwill with the general public who must buy seats from American at prices higher than those offered by defendants for fraudulently-obtained award tickets. In addition, American has lost goodwill with AAdvantage members whose mileage credit was fraudulently depleted, requiring redeposits of the mileage into the members' accounts with no compensation.

123. In addition, American has suffered and will continue to suffer irreparable harm, and its remedy at law is not itself adequate to compensate it for injuries inflicted by defendants.

In the absence of an injunction, defendants are likely to continue to make fraudulent misrepresentations or nondisclosures to American to obtain award tickets and wrongfully sell those tickets through the Internet. Accordingly, American is entitled to injunctive relief.

Fifth Cause of Action
(Breach of Contract)

124. American realleges the material facts alleged in the preceding paragraphs.

125. Pursuant to the AAdvantage contract between American and program members, defendants Robert Pirkle, and Goyal agreed to comply with the rules, regulations, and procedures of the AAdvantage program. They materially breached the contract by purchasing or selling mileage credit and award tickets, in violations of the No-Sale Rule.

126. Pursuant to the Addendum, defendant Main St. agreed to comply with the prohibition on the issuance of award tickets and upgrades that were purchased, bartered, or sold. It materially breached the Addendum by issuing award tickets and upgrades that were purchased, bartered, or sold. American has issued a debit memo to Main St. which it has failed to pay, in further violation of the Addendum.

127. As a proximate result of defendants' breaches of the AAdvantage contract and the Addendum, respectively, American has suffered damages including the cost of providing free travel to passengers not entitled to it; lost revenue from

providing free travel to passengers not entitled to it in lieu of selling tickets and service to those passengers and to other potential customers; and lost goodwill with AAdvantage members and the general flying public who wish to travel on American but are prevented from obtaining tickets because seats that would otherwise have been available are occupied by passengers with wrongfully-obtained tickets.3

[Paragraphs 128 - 134 are omitted as they do not relate to the claims against Frequent Flyer defendants]

Prayer for Relief

American respectfully requests judgment, after trial or final hearing, as follows:

1. That the Court enter judgment against defendants that they have:

a. Interfered with the contracts and prospective business relations of American, with a conscious desire to hinder or prevent those business relationships;

b. Wrongfully misappropriated valuable AAdvantage award tickets for air transportation;

c. Wrongfully obtained and sold AAdvantage mileage credit and award tickets;

d. Wrongfully depleted AAdvantage mileage credit and obtained AAdvantage award tickets;

e. Breached the terms of the AAdvantage contract (as to defendants Robert Pirkle, and Goyal);

f. Breached the terms of the Addendum (as to defendant Main St.);

g. Violated the Texas Anti-Dilution Act (as to defendants LTS and Goyal);

h. Committed trademark infringement (as to defendants LTS and Goyal);

i. Otherwise injured the business reputation or goodwill of American by the acts set forth in this Petition.

2. That the Court issue preliminary and permanent injunctive relief against all defendants that they and all others in active concert or participating with them, be enjoined and restricted from engaging in the following conduct, directly or indirectly, individually or through any entity, anywhere in the world:

a. Participating in any manner in brokering, soliciting, purchasing, offering for sale, selling, or bartering AAdvantage mileage credit and award tickets;

b. Counseling, advising, or providing information to any individual or entity regarding purchasing airline tickets obtained with purchased, sold, bartered, or brokered AAdvantage mileage credit or award tickets;

c. Utilizing or disclosing the names, addresses, telephone numbers, or account numbers of AAdvantage members in any manner or for any purpose that is prohibited by the terms of this injunction;

d. Obtaining or using airline tickets based in whole or in part on AAdvantage mileage credit and award tickets;

e. Opening, using, assigning, or accepting assignment of any AAdvantage account, mileage credit, or award ticket; and

f. Placing or distributing any advertisement, in any medium, which solicits or advertises the purchase, sale, brokering, or bartering of AAdvantage mileage credit or award tickets.

3. In addition, American is entitled preliminary and permanent injunctive relief against all defendants requiring them to do the following:

a. Deliver to American all AAdvantage award tickets, accounts statements, and related documents in their possession, custody, or control;

b. Deliver to American all documents and data in their possession, custody, or control relating to the purchase, brokering, solicitation, or barter of AAdvantage mileage credit or award tickets;

c. Deliver to all entities and persons with whom they have communicated, interacted, or provided services within the last 24 months relating to AAdvantage mileage credit or award tickets a copy of this injunction entered by the Court and a notice advising that they have permanently ceased purchasing, selling, brokering, and bartering AAdvantage mileage credit and award tickets; and

d. Deliver to American a complete list of all entitles and persons to which the notice described in subparagraph (c) has been sent.

4. That the Court order all defendants to disgorge to American all revenues received by them as a result of the wrongful conduct alleged above.

5. That the Court order all defendants to pay actual and exemplary damages to American, plus its costs and reasonable attorney fees incurred in prosecuting this action; and

6. That the Court grant to American all additional relief to which it has shown itself to be justly entitled, whether at law or in equity.

Respectfully submitted,
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ATTORNEYS FOR PLAINTIFF
AMERICAN AIRLINES, INC.

[Certificate of Service omitted]

FREQUENT FLYER DEFENDANT'S SECOND AMENDED ANSWER

NO. 067-224132-07

AMERICAN AIRLINES, INC.

VS.

FREQUENT FLYER DEPOT, INC., et. al.

IN THE DISTRICT COURT
67TH JUDICIAL DISTRICT
TARRANT COUNTY, TEXAS

COUNTERCLAIM

Frequent Flyer Depot, Inc. ("Frequent Flyer Depot"), George Pirkle ("George") and Robert Pirkle ("Robert") (jointly the "Frequent Flyer Depot defendants") file their counterclaim against American Airlines, Inc. ("American").

STATEMENT OF THE CASE

American joined the Frequent Flyer Depot as defendants in this case with other companies and persons with whom the Frequent Flyer Depot defendants have never had any relationship. [FN]1 The Frequent Flyer Depot defendants moved to sever the claims against them from the claims made against the other defendants. The Motion to Sever was denied.

Luxury Travel Source, Mukesh Kuhmar Goyal, Main St. Travel Center of Monsey, Inc. and Ben Weber

filed special appearances. They are appealing the denials of their special appearances to the Second Court of Appeals in Fort Worth, Texas. The appeal is set for submission by brief before the Court of Appeals on September 9, 2008.

The defendants have moved to dismiss American's claims pursuant to the preemption provisions of the Airline Deregulation Act of 1978.

The Frequent Flyer Depot defendants, Luxury Travel and Mukesh Kuhmar Goyal have filed their Motion for Partial Summary Judgment.

[FN1] The presence of the Frequent Flyer Depot defendants in this case destroys diversity jurisdiction.

To the knowledge of the Frequent Flyer Depot defendants, the other named defendant and the Doe defendants have not been served.

PARTIES TO COUNTERCLAIM

1. American is a Delaware corporation with its principal place of business in Fort Worth, Texas. American is the world's largest commercial passenger airline. American is an airline partner of American Eagle Airlines, both wholly owned by the AMR Corporation holding company.

2. Frequent Flyer Depot is a Texas corporation with its only place of business in Mabank, Texas.

3. Frequent Flyer Depot acts as a broker of frequent flyer miles and travel awards. Frequent

Flyer Depot assists travelers and holders of frequent flyer miles in the purchase and sale of frequent flyer tickets, mileage rewards, and upgrades.

4. American and Frequent Flyer Depot are competitors.

5. George is an employee and the president of Frequent Flyer Depot.

6. Robert is an employee of Frequent Flyer Depot and a member of American's AAdvantage program.

SALE OF TICKETS

7. American competes in the sale of airline tickets with other airlines, with persons engaged in the sale of airline tickets, and with other airlines and other persons engaged in the sale of tickets on American's flights. American also competes with persons engaged in the distribution, sale or barter of frequent flyer miles which are used to acquire airline tickets.

8. American systematically and intentionally discriminates among purchasers of its tickets. The price variations create demand and competition for lower priced airline tickets.

ELIMINATION OF COMPETITION

9. American seeks to and does eliminate competition from the unauthorized purchase of lower priced airline tickets through the sale or barter of AAdvantage frequent flyer miles, and from persons who sell lower priced tickets.

10. American has agreements with competitors restricting the unauthorized purchase, sale or barter of frequent flyer miles, and the unauthorized purchase of lower priced tickets by consumers.

11. American is part of a web of agreements among airlines and third persons which restricts and controls the exercise of airline frequent flyer miles and fixes the prices of airline tickets through restrictions on frequent flyer miles and on certain ticketing practices.

FREQUENT FLYER MILES

12. AAdvantage is American's travel awards program. AAdvantage frequent flyer miles can be obtained from American, from sources to whom American sells frequent flyer miles, from sources authorized by American to engage in the purchase, sale and barter of American's frequent flyer miles, and from unauthorized sources engaged in the purchase, sale and barter of frequent flyer miles.

13. AAdvantage frequent flyer miles can be used to obtain airline tickets from American and other airlines, and for the purchase of a variety of other goods and services from American and third persons.

14. American claims to have contracts with AAdvantage members in the form of the AAdvantage terms. These terms purport to prohibit the sale and barter of frequent flyer miles.

"ABUSIVE TICKETING"

15. American describes as "abusive ticketing" the use of validly issued tickets in a manner that results in lower fares. American uses terms such as "back to back," throwaway " and "hidden city" ticketing to describe "abusive ticketing ."

16. In its Conditions of Carriage, American prohibits "abusive ticketing."

AMERICAN'S PENALTIES

17. American claims the right to penalize passengers who violate American's rules.

18. American claims the right to penalize AAdvantage members who sell or barter their frequent flyer miles. The penalties are used to penalize AAdvantage members who do things of which American disapproves and fail to cooperate with American's efforts to eliminate unauthorized ticketing practices.

AMERICAN'S MISREPRESENTATIONS

19. American represents that contracts exist between AAdvantage members and American and that the frequent flyer miles have a value. These representations are false, misleading and deceptive in that no such contracts exist and any value that American's frequent flyer miles can be eliminated by American at any time.

20. American represents that AAdvantage program members are barred from selling or bartering their American frequent flyer miles. This representation is false, misleading and deceptive in

that there are no enforceable limitations on AAdvantage program members' right to sell or barter their frequent flyer miles.

21. American represents that AAdvantage frequent flyer program members and others are barred from purchasing or bartering their American frequent flyer miles. This representation is false, misleading and deceptive in that there are no enforceable limitations on AAdvantage frequent flyer program members' right to sell or barter his frequent flyer miles.

22. American made false representations to Robert Pirkle as an AAdvantage member and wrongfully sued Robert Pirkle for alleged violations of American's unenforceable AAdvantage terms and conditions.

AGREEMENTS AND THE PREVENTION OF THE SALE AND BARTER OF FREQUENT FLYER MILES AND "ABUSIVE TICKETING"

23. American seeks to prevent the purchase of lower priced tickets by consumers through the use of frequent flyer miles and "abusive ticketing." American is a party to numerous agreements with competitors to accomplish its ends.

24. American and other airlines own the close corporation known as Airlines Reporting Corporation or "ARC." The owners of ARC include Alaska Airlines, American Airlines, Continental Airlines, Delta Air Lines, Northwest Airlines, United Airlines and US Airways. ARC's board of directors include representatives from Alaska Airlines, American

Airlines, British Airways, Continental Airlines, Delta Air Lines, Hawaiian Airlines, Lufthansa German Airlines, Northwest Airlines, Southwest Airlines, United Airlines and US Airways.

25. Through its ARC agreements and addenda with travel agents, American imposes agreements on travel agents prohibiting "abusive ticketing" and the sale and barter of frequent flyer miles.

26. American and competing airlines use ARC procedures to enforce its restrictions and agreements and to punish persons who violate its agreements and restrictions. When utilized as described, ARC is a restraint of trade among the airlines.

28[sic]. With other airlines, American owns the Airline Tariff Publishing Company or ATPCO. The owners of ATPCO include Alaska Airlines, Inc., American Airlines, Inc., Continental Airlines, Inc., Delta Air Lines, Inc., Northwest Airlines, Inc., United Airlines and US Airways. APTCO publishes the latest airfares for more than 500 airlines multiple times per day.

29. ATPCO provides fare data in an electronic format with the encoded rules associated with those fares, which make the information suitable for computer processing. The users of the data are Global Distribution Systems (GDS), such as Sabre, Amadeus, and Travelport; the Computer Reservation Systems (CRS) of airlines and travel agents; online travel agencies such as Expedia, Orbitz, Travelmia and Travelocity; and other service providers in the travel industry.

30. An airline's latest fare changes can be loaded automatically, allowing these new fares to be sold in the market place in the shortest possible time. Fares are updated by APTCO three times a weekday in United States and Canada markets, five times each weekday for international markets, and twice Saturday and Sunday for all markets.

31. ATPCO gives American and other airlines the ability to monitor and discourage lower pricing of airline tickets.

32. American has code-sharing agreements with other airlines which include agreements on the issuance and use of frequent flyer miles and on "abusive ticketing." American's code-sharing agreements are with British Airways, Cathay Pacific Airways, Finnair, Iberia, Japan Airlines, LAN Airlines, Malev Hungarian Airlines, Qantas Airways, Royal Jordanian, Aer Lingus, Alaska Airlines, Brussels Airlines, China Eastern Airlines, EVA Air, Gulf Air, Hawaiian Airlines, Jet Airways and Mexicana.

33. American belongs to the oneworld alliance which includes agreements on the issuance and use of frequent flyer miles and on "abusive ticketing."

34. American has agreements with other airlines which fly under American's name brand which include agreements on the issuance and use of frequent flyer miles and on "abusive ticketing." Chautauqua Airlines and Trans States Airlines are American Connection airlines.

35. In addition to American, Chautauqua Airlines has agreements with Delta Air Lines, Continental Airlines, United Express and US Airways. Trans States Airlines has agreements with American, United Airlines and US Airways. Alaska Airlines has agreements with American, American Eagle, Continental, Delta and Northwest.

36. American has other agreements other airlines which relate to ticketing, and the issuance and use of frequent flyer miles, and "abusive ticketing." American Eagle is a subsidiary of American's parent corporation. American Eagle has agreements with Northwest Airlines, Delta Air Lines, and Continental Airlines.

37. American has agreements with others who sell airline tickets which relate to ticketing, and the issuance and use of frequent flyer miles, and "abusive ticketing." Alaska, American, British Airways, Delta, Continental, Lufthansa, Northwest, US Air and United have agreements with points.com. Priceline.com, Obitz and Travelocity have agreements with Alaska, American, Delta, Continental, Lufthansa, Northwest, US Air and United. Hotwire has agreements with Alaska, Delta, Continental, Lufthansa, Northwest, US Air and United. Other agreements exist.

38. American seeks to prevent companies from using its fares and schedules made available to travel agents through global distribution systems to make lower fares available to consumers. American sued to prevent companies from using an airline's fares and schedules made available to travel agents

through global distribution systems from making the lower fares available to consumers.

39. Passengers seeking less expensive airline tickets and frequent flyer miles owners hoping to sell their miles often seek to do so through the Internet. American has brought this suit to prevent this competition.

40. American takes steps to eliminate competition by preventing actual and potential competitors from taking advantage of the Internet. American's suit against Google to eliminate this form of competition was recently dismissed with prejudice.

41. Consumers of airline tickets often seek the lowest available priced tickets on flights that best meet their needs. American seek to eliminate competitors who purport to offer lower prices than American.

42. The result of American's actions and those of American's competitors is the reduction of competition and the maintenance, stabilization and fixing of the prices of airline tickets.

ACTIONS AGAINST AADVANTAGE MEMBERS

43. Tickets purchased with frequent flyer miles transferred outside the means authorized and controlled by American are subject to cancellation by American and the parties seeking to buy and sell lower priced tickets are subject to penalties.

44. American contacts frequent flyer mile members it suspects may have conveyed, by sale or

barter, their frequent flyer miles, and threatens and imposes retribution against these persons such as cancelling issued tickets and cancelling frequent flyer miles and with other penalties if they do convey the miles through persons or processes not controlled and/or authorized by the airline.

45. American contacts persons it believes have sold or transferred frequent flyer miles and through threats and penalties forces that these persons provide information related to their alleged wrongs.

46. American refuses to honor tickets it believes were acquired with purchased or bartered frequent flyer miles or through unapproved ticketing practices, and require the passengers to pay full fares if they wish to fly to their chosen destination.

CO-CONSPIRATORS

47. American has conspired with various persons to commit the described wrongful actions against airline passengers, Frequent Flyer Depot and other engaged in the sale of airline tickets and to asset such persons in similar actions.

48. American has entered into illegal agreements with competitors to fix prices, to restrict the use of frequent flyer miles and to eliminate "abusive ticketing," all in violation of the Texas Free Enterprise Act of 1983.

49. The Frequent Flyer Depot parties do not know the names of all of the conspirators, but allege, based on information and belief, that the following persons are conspirators: Alaska Airlines, Continental

Airlines, Delta Air Lines, Northwest Airlines, United Airlines, US Airways and American Eagle Airlines.

50. Other persons are either co-conspirators or are one of the means by which the conspiracy is effectuated including Airlines Reporting Corporation and Airline Tariff Publishing Company.

51. Generally, American's willing and unwilling co-conspirators include:

a. entities and persons which sell airline tickets;

b. domestic and foreign carriers who participate in alliances, code-sharing agreements and other agreements with the named airlines;

c. various entities and trade groups owned, controlled or utilized by the named airlines; and

d. airlines which operate under brand names of the named airlines which feed passengers to and receive passengers from the named airlines.

CAUSES OF ACTION

Interference with Contractual and Business Relations

52. The above described actions taken by American wrongfully interfered with Frequent Flyer Depot's relationships with existing customers and prevented Frequent Flyer Depot from obtaining additional customers.

53. American acted and continues to act with a willful desire and intent to hinder and interfere with, and continues to interfere with Frequent Flyer Depot's contracts with persons who seek to sell and purchase AAdvantage frequent flyer miles by making the exercising of those persons rights more difficult, by threatening Frequent Flyer Depot's customers, and by seeking to eliminate Frequent Flyer Depot's means of obtaining business from persons seeking to sell and purchase AAdvantage frequent flyer miles.

54. As a proximate result of American's tortious interference, Frequent Flyer Depot has suffered injury and damages, including being deprived of being able to conduct free and open business with owners of American's frequent flyer miles.

55. In addition, Frequent Flyer Depot has suffered and will continue to suffer irreparable harm, and its remedy at law is not itself adequate to compensate for injuries inflicted by American. In the absence of an injunction, American is likely to attempt to interfere with Frequent Flyer Depot's right to conduct business with AAdvantage members. Accordingly, Frequent Flyer Depot is entitled to injunctive relief.

Tortious Interference with Prospective Relations

56. But for American's wrongful actions, holders of American's frequent flyer miles would have sought to sell or barter their frequent flyer miles through Frequent Flyer Depot.

57. American wrongfully interfered with Frequent Flyer Depot's reasonable expectations of being able

to do business with holders of American's frequent flyer miles.

58. American's actions were independently tortious in that the actions were taken in the course of an illegal restraint of trade under Texas Free Enterprise Act of 1983.

59. American's tortious interference proximately caused Frequent Flyer Depot damages in that, absent American's wrongful actions, additional holders of American's frequent flyer miles would have done business with Frequent Flyer Depot.

60. In addition, Frequent Flyer Depot has suffered and will continue to suffer irreparable harm, and its remedy at law is not itself adequate to compensate for injuries inflicted by American. In the absence of an injunction, American is likely to continue to attempt to interfere with Frequent Flyer Depot's business relations with holders of American's frequent flyer miles. Frequent Flyer Depot is entitled to injunctive relief.

Declaratory Judgment

61. Frequent Flyer Depot and Robert Pirkle seek a declaratory judgment stating that American:

a. American does not have contracts with AAdvantage members;

b. AAdvantage members are not legally barred from selling or bartering their American frequent flyer miles;

c. AAdvantage frequent flyer program members and others are not legally barred from purchasing or bartering their American frequent flyer miles;

d. Third persons are not barred from engaging in the purchase, sale and barter of AAdvantage frequent flyer miles;

e. The provisions in the AAdvantage terms and conditions allowing American to take unilateral action against AAdvantage members are illegal and unenforceable penalties; and

f. American's restrictions against "abusive ticketing" are illegal and against public policy and are unenforceable.

Violations of the Texas Free Enterprise Act of 1983

62. American has acquired or has attempted to acquire monopoly power over the means by which consumers may exercise their rights in American's frequent flyer miles and over the prices of tickets sold for flights on American, and has engaged in predatory, discriminatory and anticompetitive activity to obtain, create, maintain and enforce its monopoly power.

63. American has conspired to monopolize the means by which members may exercise their right in American's frequent flyer miles and over the prices paid for American's tickets. American has engaged in predatory, discriminatory and anticompetitive

activity to obtain, create, maintain and enforce its monopoly power.

64. American and others in competition with American, willfully and flagrantly, have conspired to take steps with the purpose and effect of (a) fixing the prices of airline tickets, and (b) fixing and controlling the use of American's frequent flyer miles.

65. American's actions violate the provisions of §15.05(a) and (b) of the Texas Business & Commerce Code.

66. American's conduct is willful or flagrant.

Violations of Texas Deceptive Trade Practices Act

67. The above described representations made by American to AAdvantage members and Robert Pirkle violated the Texas Deceptive Trade Practices Act in that American represents that its frequent flyer program has characteristics, uses, benefits, or quantities which it does not have, and American's frequent flyer program offers benefits and rights to members and has obligations and duties on members and American that are of a particular standard, quality, or grade, or that goods are of a particular style or model, when they are of another.

68. American filed suit against Robert on a claim based on Robert's membership in the AAdvantage Frequent Flyer Program in this county rather than the county of Robert's resident in violation of the Texas Deceptive Trade Practices Act.

69. The foregoing violate Section 17.46 of the Deceptive Trade Practices - Consumer Protection Act.

70. Robert relied upon American's misrepresentations in doing business with American.

71. American's conduct with regard to American's AAdvantage Frequent Flyer Program is unconscionable as American represents to actual and prospective members of the Frequent Flyer Program that they are bound to act in ways demanded by American to their financial detriment when, in fact, they are not bound.

72. American has further sued Robert for alleged violations of his supposed obligations to American under the AAdvantage Frequent Flyer Program and for allegedly participating in others' alleged violations of his supposed obligations when, in fact, no such obligations exist as is known by American.

73. By such conduct, American took advantage of the lack of knowledge, ability, experience or capacity of Robert and other members of the AAdvantage Frequent Flyer Program, to Robert's detriment and damage, to a grossly unfair degree.

74. American's actions as described in this Counterclaim and in its Third Amended Petition are fraudulent.

75. Frequent flyer miles as treated by American have little or no value and that value is subject to unilateral elimination by American at any time it pleases.

76. As a result, the consideration paid for such frequent flyer miles, either by flying on American and paying a price that included the cost of the frequent flyer mile as determined by American or using a particular vendor, who included in its price the cost the vendor paid to American was fraudulently obtained by American.

Damages

72.[sic]Frequent Flyer Depot seeks to recover its actual damages of not less than $200,000, plus prejudgment and postjudgment interest as allowed by law.

73. Robert seeks to recover his damages of not less than $5,000.

74. Frequent Flyer Depot seeks to recover interest as allowed by § 15.21(a) of the Texas Business & Commerce Code.

75. Under the provisions of §15.21(a) of the Texas Business & Commerce Code, Frequent Flyer Depot seeks to recover treble its actual damages.

Injunctive Relief

76. Frequent Flyer Depot seek an injunction against American prohibiting (a) future violations of §15.05(a) and (b) future violations of the Texas Business & Commerce Code, (b) § 15.05 (b) of the Texas Business & Commerce Code, (c) actual or attempted enforcement of its AAdvantage terms and conditions prohibiting the barter and sale of frequent

flyer miles, and (d) actual or attempted enforcement of its rules against "abusive ticketing."

77. Frequent Flyer Depot and Robert Pirkle seek an injunction against American prohibiting the enforcement of the following provisions in the AAdvantage terms and conditions:

> a. At no time may AAdvantage mileage credit or award tickets be purchased, sold or bartered. Any such mileage or tickets are void if transferred for cash or other consideration. Violators (including any passenger who uses a purchased or bartered award ticket) may be liable for damages and litigation costs, including American Airlines attorneys fees incurred in enforcing this rule.
>
> b. Use of award tickets that have been acquired by purchase or for any other consideration may result in the tickets being confiscated or the passenger being denied boarding. If a trip has been started, any continued travel will be at the passenger's expense on a full-fare basis. The passenger and member may also be liable to American Airlines for the cost of a full fare ticket for any segments flown on a sold or bartered ticket.
>
> c. Fraud, misrepresentation, abuse or violation of applicable rules (including, but not limited to, American or American Eagle conditions of carriage, tariffs and AAdvantage program rules) is subject to appropriate administrative and/or legal action by appropriate governmental authorities and American

Airlines. Such action may include, without limitation, the forfeiture of all award tickets, and any accrued mileage in a member's account, as well as cancellation of the account and the member's future participation in the AAdvantage program. In addition, American Airlines reserves the right to take appropriate legal action to recover damages, including its attorney fees incurred in prosecuting any lawsuit.

d. American Airlines reserves the right to audit any and all accounts at any time and without notice to the member to ensure compliance with AAdvantage program rules and applicable conditions of carriage and/or tariffs. In the event that an audit reveals discrepancies or violations, the processing of AAdvantage awards, mileage accrual and summaries may be delayed until the discrepancies or violations are resolved satisfactorily to American Airlines. Pending such resolution, members may be prohibited from redeeming mileage credits for an AAdvantage award or ticket as determined in American's sole discretion.

78. Frequent Flyer Depot seeks an injunction against American prohibiting the enforcement of the following provisions in the Conditions of Carriage:

Unless a ticket is reissued by American or its authorized agent upon payment of applicable charges, or an authorized representative of American waives applicable restrictions in writing, a ticket is invalid:

1. If used for travel to a destination other than that specified on the ticket,

2. If the passenger fails to comply with applicable stay-over requirements,

3. If the passenger does not meet the purpose or status requirement associated with the fare category on the ticket, or

4. If American determines that the ticket has been purchased or used in a manner designed to circumvent applicable fare rules.

American specifically prohibits the practices commonly known as:

Back to Back Ticketing: The combination of two or more roundtrip excursion fares end to end for the purpose of circumventing minimum stay requirements.

Throwaway Ticketing: The usage of roundtrip excursion fare for one-way travel, and Hidden City/Point Beyond Ticketing: Purchase of a fare from a point before the passenger's actual origin or to a point beyond the passenger's actual destination.

Where a ticket is invalidated as the result of the passenger's non-compliance with any term or condition of sale, American has the right in its sole discretion to:

1. Cancel any remaining portion of the passenger's itinerary,

2. Confiscate unused flight coupons,

3. Refuse to board the passenger or check the passenger's luggage, or

4. Assess the passenger for the reasonable remaining value of the ticket, which shall be no less than the difference between the fare actually paid and the lowest fare applicable to the passenger's actual itinerary

Relief Unique to Robert Pirkle

79. American's conduct as described above was a producing cause of Pirkle's economic damages. As a result, Pirkle sustained damages in that Pirkle's AAdvantage frequent flyer miles are less valuable than they would have been had American not attempted to impose its restrictions upon Pirkle and other holders of AAdvantage frequent flyer miles, and Pirkle has been required to retain an attorney to represent him in this matter. Due to the continuing nature of this litigation, Pirkle's damages continue to accrue, but his damages with regard to his frequent flyer miles is at least $3,000.

80. Pursuant to §17 .506, TEX. BUS. & COMM. CODE, Robert seeks to recover his attorney's fees which are estimated to be $50,000.

81. American's conduct as described in this Counterclaim was committed knowingly. American is a major publicly traded corporation with a legal department. American was actually aware, at the time of the conduct, of the falsity, deception, and

unfairness of the conduct about which Robert complains.

82. As a direct result of American's knowing misconduct, Robert has suffered mental anguish. In particular, Robert suffered mental anguish damages from having been sued by American to enforce rights that do not exist and to recover damages from Robert for breaches of American's rights which do not exist, from being accused of having committed fraud and of having engaged in illegal actions, which are untrue and false, and accompanying panic attacks, and loss of sleep and appetite, all of which commenced on the date that Robert became aware of the lawsuit and the fact that he has been named a defendant in this lawsuit. Accordingly, American is liable to Robert for mental anguish damages suffered by Robert.

83. Robert seeks additional damages of up to three times the amount of economic damages as permitted by the Deceptive Trade Practices-Consumer Protection Act as American's actions were committed knowingly. That is, American had actual awareness of the falsity, deception, or unfairness of the acts or practices.

Attorney's Fees

84. Pursuant to the Texas Declaratory Judgment Act and the Texas Free Enterprise Act of 1983, Frequent Flyer Depot, George and Robert seek to recover their attorney's fees. Such fees are estimated to be at least $250,000.

WHEREFORE, Frequent Flyer Depot, Inc., George Pirkle and Robert Pirkle pray that American Airlines

take nothing on its claims against Frequent Flyer Depot, Inc., George Pirkle and Robert Pirkle and that upon final hearing Frequent Flyer Depot, Inc., George Pirkle and Robert Pirkle recover from American Airlines, Inc. the above described relief and such other and further relief as to which they may show themselves to be justly entitled.

Respectfully submitted,
BENNETT, WESTON & LaJONE, P.C.

/s/ J. Michael Weston

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[Certification of service omitted]

FREQUENT FLYER DEFENDANT'S SECOND AMENDED ANSWER

NO. 067-224132-07

AMERICAN AIRLINES, INC.

VS.

FREQUENT FLYER DEPOT, INC., et. al.

IN THE DISTRICT COURT
67TH JUDICIAL DISTRICT
TARRANT COUNTY, TEXAS

SECOND AMENDED ANSWER

Defendants Frequent Flyer Depot, Inc., George Pirkle and Robert Pirkle ("FFD defendants") file their Second Amended Answer as follows:

GENERAL DENIAL

1. FFD defendants deny each and every allegation contained in plaintiffs Second Amended Petition and demand strict proof thereof.

AFFIRMATIVE DEFENSES

2. FFD defendants affirmatively plead that plaintiff's claims for equitable relief are barred by laches.

3. FFD defendants affirmatively plead that plaintiff's claims for equitable relief are barred by the doctrine of unclean hands.

4. FFD defendants affirmatively plead that the plaintiff's claims are barred by the applicable statutes of limitations.

5. FFD defendants affirmatively plead that plaintiff's claims are barred as illegal restraints on alienation.

6. FFD defendants affirmatively plead that plaintiff's claims are barred as illegal restraints on trade.

7. FFD defendants affirmatively plead that plaintiff's claims are barred by illegality for violations of the Texas Free Enterprise & Antitrust Act and Sections 1 and 2 of the Sherman Act, 15 U.S.C. Sections 1-2.

8. FFD defendants plead that American airlines has no contract with the members of the AAdvantage frequent flyer program.

9. American's claims against the FFD defendants are pre-empted pursuant to 49 U.S.C. §41713 as being related to the prices, routes, or services of an air carrier, American.

WHEREFORE, defendants Frequent Flyer Depot, Inc., George Pirkle and Robert Pirkle pray that upon final hearing that the plaintiff take nothing, that all costs be taxed against the plaintiff

and for such other and further relief as to which they may show themselves to be justly entitled .

Respectfully submitted,
Bennett, Weston, & LaJone, P.C.
/s/ J. Michael Weston
J. Michael Weston
State Bar No. 21232100
1750 Valley View Lane, Suite 120
Dallas, Texas 75234
214.691.1776
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[Certificate of service omitted]

REPORT'S RECORD

VOLUME 1 OF 1 VOLUME
TRIAL COURT CAUSE NO. 067-224132-07

IN THE DISTRICT COURT
TARRANT COUNTY, TEXAS
67TH JUDICIAL DISTRICT

AMERICAN AIRLINES, INC.

PLAINTIFF,

VS.

JOHN DOE

DEFENDANTS.

HEARING

On the 16th day of September, 2008, the following proceedings came on to be heard in the above-entitled and numbered cause before the Honorable Don Cosby, Judge presiding, held in Fort Worth, Tarrant County, Texas:
Proceedings reported by machine shorthand.

[PAGES OMITTED]

[FROM PAGES 35]

Q. You have brokered hundreds of AAdvantage tickets since 2006; is that correct?
A. Yes.

Q. Of the AAdvantage tickets that you sell, 99.9 percent are for international first class or business class travel?
A. That's close, yes.
Q. Okay. You sell V as AAdvantage tickets for discounts of about 70 percent off of American's fares?
A. Between 50 to 70 percent.
Q. And you personally set the price for the AAdvantage award tickets that you sell?
A. Yes.

[FROM PAGES 42-43]

Q. (BY MS. ROTMAN) Walking through a transaction, you get customers through your Web site who want to purchase airline tickets; is that correct?
A. Yes.
Q. And those customers tell you about a particular itinerary they want to fly?
A. They give us where they want to fly to. Most of them do not give us an itinerary, meaning, a specific airline and the flight and time. Some do, but the majority of them don't.
Q. Okay. So then your work is to find a particular airline that will take them to their desired destination?
A. We do the grunt work, yes.
Q. Okay. And once you determine that there's an airline that would have an available itinerary, you are figuring out whether that airline offers an award ticket for that itinerary, right?
A. Yes.
Q. You only deal with award tickets?

A. When you say tickets, we deal with award or frequent flyer miles. There are awards that we do not deal with. It's only the miles.
Q. Okay. What are the awards that you don't deal with?
A. Anything that has an award attached to it. We only -- we only broker frequent flyer miles. If you have an upgrade or if you have a special going on which is an award, we don't do anything with those at all.
Q. Okay. So as it relates to American Airlines, you only deal with AAdvantage award tickets?
A. Yes.
Q. Okay. And if you determine that the itinerary is available from an AAdvantage award ticket, then you will, as a next step, find someone from whom you can purchase the AAdvantage miles to obtain the award ticket; is that correct?
A. Well, you don't purchase anything. We broker the deal between the buyer and the seller. We do the grunt work. We actually make the reservation, which is the hardest thing to do. We don't purchase anything.

[FROM PAGE 102]

Q. And once these mileage credits are made by American, who actually owns those -- those mileage credits?
A. American Airlines retains ownership of the miles.
Q. And what are the AAdvantage members then permitted to do with those earned miles?
A. AAdvantage members are permitted to use the miles to redeem them for travel on American Airlines and our various partners. They're eligible to redeem

them for other goods and services that may be offered from time to time by our various partners.
Q. And those particular benefits are made available to the AAdvantage members through some documentation or through the Web site or how do they find out what --
A. Primarily, through the Web site, AA.com. There's a section on the Web site where customers can learn about the various ways to earn and use AAdvantage miles.

[FROM PAGES 116 – 118]

MR. WESTON: Let's mark this as Defendant's Exhibit No. 2.
Q. (BY MR. WESTON) Do you recognize that document, sir?
A. Yes, sir.
Q. What is that document?
A. This is a list of AAdvantage participants as it
Q. Would these be the AAdvantage partners that we were talking about?
A. Yes, sir.
Q. Is this a complete list?
A. I do not know that.
Q. Okay. And on the first page there is a listing of airlines that are AAdvantage partners. Do you see that?
A. Just the first page or first page and second page?
Q. First and second. Thank you.
A. Yes, sir.
Q. So, if I understand, what you're saying is that specifically on these airlines, these are airlines that a passenger flying on can get American Airlines AAdvantage miles issued to them; is that correct?

A. Yes, sir.
Q. Okay. And these are also airlines that people could -- passengers can use AAdvantage miles to fly on these airlines; is that not correct?
A. With some restrictions, yes, sir.
Q. Okay. So there would be an agreement between American Airlines and these airline partners that are shown on Defendant's Exhibit No. 2?
A. Yes, sir.
Q. And that would set out the parameters of the agreements between American Airlines and these other airlines?
A. That's right.
Q. And included in the agreement between American Airlines and these partner agreements would be restrictions on the use of American Airlines frequent flyer miles, specifically, that they cannot be purchased, sold or bartered; is that not correct?
A. I can't -- I do not know the answer to that.
Q. Okay. To your knowledge, can a British Airways, for example, engage in the purchase, sale or barter of American Airlines frequent flyer miles?
A. Can British Airways the entity?
Q. Yes.
A. British Airways does purchase AAdvantage miles from AAdvantage, yes.
Q. But can they do it for a customer? Can a customer call up and say I want to trade my frequent flyer miles, American Airlines, with another person and fly on British Airways. Can British Airways do that?
A. No. If I understand your question, no, they cannot.
Q. Can any of the airlines do it?
A. No, sir.

Q. They all have agreements with American Airlines that they won't do that; isn't that the fact?
A. Well, no, I can't testify to that.
Q. You don't know if they have -- the form of their agreement but --
A. That's correct.
Q. -- you know they cannot do it?
A. Right.
Q. Do you know what percentage of American Airlines AAdvantage miles are earned by people flying on American Airlines?
A. I do not know the exact percentage, but the vast majority would be accrued by travel on American Airlines.
Q. Isn't it, in fact, that about half the American Airlines miles issued are sold by American Airlines to partners?
A. I do not know what the exact percentage is.

[FROM PAGES 122-124]

Q. (BY MR. WESTON) Mr. Balsam, will you look at the -- one, two, three, four -- fifth page of exhibit -- Defendant's Exhibit No. 3.
A. Yes.
Q. Where it says you can buy purchase points for yourself or someone else?
A. Yes.
Q. Okay. And it lists a number of airlines that you can do this with, does it not?
A. Yes, it does.
Q. Alaska Airlines, American Airlines, Delta SkyMiles, Frontier Airlines, Icelandair Airlines, JetBlue TrueBlue -- excuse me -- Lufthansa, Midwest, Northwest and Virgin Atlantic. Do you see that?

A. Yes, I do, among others.
Q. So through points.com, people can share their airline miles with all those airlines; is that not a fact? That's what it says. That's what the document says.
A. Well, no, sir. I disagree with that. That's not what this document says.
Q. It says you can buy them.
A. May I read the pertinent part?
Q. Feel free.
A. The top of the first page that you referenced, it says buy purchase points or miles for yourself or someone else. It does not mention sharing across programs.
Q. Fine. Let's look at the seventh -- I believe it's the seventh page of the same document. Do you see that document?
A. Yes, I do.
Q. Where it says share your points or miles?
A. Yes.
Q. And it lists a number of airlines, doesn't it?
A. Yes, it does.
Q. Alaska Airlines, American Airlines, Delta Airlines, Frontier Airlines, U.S. Airlines, Icelandair Airlines. Do you agree?
A. Yes, among others, including the hotel program.
Q. Yes.
A. Two hotel programs.
Q. To your knowledge, does American Airlines have a contract permitting points.com to do this?
A. To my knowledge, yes.
Q. Have you ever seen the contract?
A. No.

Q. Now, you know that American Airlines has an agreement with regard to frequent flyer miles with Alaska Airlines, do you not?
A. I'm aware that we have the ability for customers to earn miles on Alaska Airlines.

[REMAINDER OF PAGE 124 OMITTED]

[PLAINTIFF'S TEMPORARY INJUNCTION EXHIBIT NO. 1, PAGE 1]

[EXCERPS FROM ORIGINAL EXHIBIT] FROM FREQUENT FLYER DEPOT'S WEBSITE

[GRAPHICS AND LINKS OMITTED]

"Welcome to Frequent Flyer Depot. We are the premiere online brokerage of frequent flyer tickets and mileage rewards. Frequent Flyer Depot specializes in international, first class and business class travel. Our brokerage offers you speedy, professional service and cheap discount airline tickets to any destination in the world. We have 14 years of experience in providing the best bargains in business class and first class airfares. Learn more about who we are and find out about what we do." [Links and emphasis omitted].

[FROM PAGE 5]

"Starting in Dallas, Texas, Frequent Flyer Depot has been in business since 1992. Frequent Flyer Depot provides professional brokerage of all frequent flyer miles and mileage rewards worldwide. Frequent Flyer Depot is the online identity of Last Minute Travel, which is owned and operated by George Pirkle. Frequent Flyer Depot guarantees that you will save money on your first class and business class airfares. If you are looking for a secure site, quality and speedy service, then trade online with us."

[FROM PAGE 7]

"Frequent Flyer Depot provides a secure service that allows travelers to buy and sell all frequent flyer tickets, mileage rewards, and upgrades. Frequent Flyer Depot provides business and first class travel, both domestic and international, with savings up to 70% off on your airline tickets. To maintain the finest service and the highest rate of return, we have a hassle-free cash-In/cash-out process. This policy guarantees our clients quick and secure transactions. Frequent Flyer Depot is not affiliated with any airline, banking Institution, credit card company or their respective frequent flyer or air award programs. Frequent Flyer Depot's use of names related to these companies or programs does not constitute an infringement on their trademarks or an attempt to profit from their trademarks. Frequent Flyer Depot's intent is to educate its clients of the various programs that offer frequent flyer incentives so that they make informed decisions when trading in their travel awards."

[FROM PAGE 9]

"Frequent Flyer Depot provides a secure service that allows travelers to buy and sell all frequent flyer tickets, mileage rewards, and upgrades. Frequent Flyer Depot provides business and first class travel, both domestic and international, with savings up to 70% off on your airline tickets. To maintain the finest service and the highest rate of return, we have a hassle-free cash-in/cash-out process. This policy guarantees our clients quick and secure transactions.

To purchase miles buyers must firs t call, email, or fax the type and amount of miles, including their contact information. Frequent Flyer Depot will then

contact the buyer for verification within two (2) business hours.

When a seller is matched to the buyer's request, Frequent Flyer Depot verifies if the buyer wishes to proceed with the transaction. Upon receiving confirmation, Frequent Flyer Depot will initiate the process which transfers funds and places the ticket(s) in the buyer's name. To learn more about this transaction, please visit the appropriate section under How to Buy & Sell.

Buyers pay the cost of the ticket(s) and all fees including international airport taxes, expedite and security fees, if any. (Note: Frequent Flyer Depot's broker fee is already included In the price of the ticket.) International airport taxes may range in price from $30 to $120, depending on destination and how many legs you fly. Expedite fees may cost up to $75, and security taxes may cost $5 per leg. For current prices, please see our price list."

[FROM PAGE 11]

"Frequent Flyer Depot aims to deliver the best-rates and the finest service to our clients. We strive to provide our clients with the most competitive rates found online. We also provide up-front pricing on our brokerage fees. See our pricing chart for details.

To sell miles, sellers may call, email or fax Frequent Flyer Depot and supply their contact information, the type and amount of miles they wish to self. Frequent Flyer Depot will then contact the seller for verification purposes within two (2) business hours.

Once a seller is matched with a prospective buyer, Frequent Flyer Depot will confirm that the buyer and seller still wish to proceed, then process the funds and tickets transfer. For more information about this process, please view the appropriate section under How to Buy & Sell.
Sellers earn the following: 1.8 cents per mile on AA, 2.0 cents per mile on BA; 1.4 cents per mile on Continental and Northwest, and 1.6 cents per mile (minimum of 90,000 miles) for all other carriers. Sellers are also reimbursed for all out-of-pocket expenses, international airport taxes range in price from $30 to $120, depending on destination and how many legs you fly. Expedite fees may cost up to $75, and security taxes may cost $5 per leg. For current prices, please see our price list.

[FROM PAGE 13]

"Although airline policy discourages buying or selling miles, it is NOT against the law for you to buy or sell frequent flyer awards. We will be happy to address any questions or concerns you may have.

To save yourself time and money, plan your itinerary and shop before you buy.

We broker the transfer of miles in most frequent flyer programs. However, because each program is different, we encourage you to review your award policy. Please browse our Eligibility section for a listing of award programs."

[PLAINTIFF'S TEMPORARY INJUNCTION EXHIBIT NO. 3, PAGE 1]

[EXCERPS FROM ORIGINAL EXHIBIT]

FROM AMERICAN AIRLINE'S WEBSITE

[GRAPHICS AND LINKS OMITTED]

AADVANTAGE TERMS & CONDITIONS

"Earning AAdvantage Miles

To ensure you receive credit for your AAdvantage transactions, please provide your AAdvantage number when you make your travel reservations or use the services of our participants. Retain all flight documents until the mileage credit appears on your mileage summary. Members may track their summary online at www.aa.com or by subscribing to receive the AAdvantage eSummary. For transactions with other participants, retain your original paid invoice. AAdvantage eSummary subscribers receive their summary and information every month, regardless of activity level. Your summary includes f light and participant mileage earned, along with newsletters and special promotions.

- AAdvantage members must have mileage earning or redeeming activity once every 18 months in order to retain their miles. Miles will first expire under this 18-month policy on December 15, 2007. If your account has no qualifying activity in any 18-month period, all miles in the account will expire except for those miles earned prior to July 1, 1989 in accounts established prior lo January 1, 1989 whose mileage credit will not expire. Each

qualifying activity extends the expiration date of all unexpired mileage credit in your account for 18 months from the date of the qualifying activity. Qualifying activity is defined as redeeming any AAdvantage award or accruing mileage credit on any eligible American, American Eagle, AmericanConnection or AAdvantage airline participant as well as accruing mileage credit with participating hotels, car rental companies, credit cards, telecommunication providers, and other service providers offering AAdvantage mileage credit.

- Mileage will be credited only to the account of the AAdvantage member who flies, rents a car, stays at a hotel or earns mileage utilizing other participating companies. No mileage credit will be awarded for canceled flights or if you are accommodated on another airline.
- Except as otherwise explained below, mileage credit is not transferable and may not be combined among AAdvantage members, their estates, successors and assigns. Accrued mileage credit and award tickets do not constitute property of the member. Neither accrued mileage, nor award tickets are transferable b y the member (i) upon death , (ii) as part of a domestic relations matter, or (iii) otherwise by operation of law. However, American Airlines, in its sole discretion, may
- credit accrued mileage to persons specifically identified in court approved divorce decrees and wills upon receipt of documentation satisfactory to American Airlines and upon payment of any applicable fees. Mileage credit is transferable between AAdvantage accounts

when offered by AA online, with the shareAAmiles program. The member must adhere to the rules and limitations of the shareAAmiles program.

- AAdvantage flight mileage credit is determined on the basis of nonstop distances between the airports where your flight originates and terminates. On connecting flights, you'll receive mileage credit for each segment of your trip; on single-plane flights, you'll receive the nonstop origin-destination mileage, except on TAM. On American Airlines and other AAdvantage airline participants, you'll receive AAdvantage mileage credit only for the class of service on which your fare is based when you are ticketed. American Airlines is the final authority on qualification for mileage credit and reserves the right to deny or revoke mileage credit at any time if American Airlines determines that mileage credit was improperly given.
- Mileage credit cannot be earned for the same flight, hotel stay t, or car rental in more than one of the following programs: the AAdvantage program or any other loyalty program in which American Airlines participates.
- After your f light departs, you will not be able to change your selection of a frequent traveler program for earning mileage credit.
- You will not be able t o transfer mileage you accumulate in the AAdvantage program to any other carrier's program, nor can you transfer mileage you accumulate in another carrier's program to the AAdvantage program.

- You may accrue mileage only for purchased, eligible, published-fare tickets on qualifying routes used in accordance with all applicable conditions of carriage, tariffs, rules and terms of ticketing and travel. AAdvantage mileage accrual eligibility on airline participant routes is subject to change without notice.
- Mileage can only be accumulated one time per flight, regardless of the number of seats purchased.
- Only individual persons are eligible for AAdvantage program membership. Corporations, other entities, animals or blocked-seat baggage are not eligible to become AAdvantage members or to accrue AAdvantage miles. Generally, only the member named on the account will be entitled to access account information. However, American Airlines does comply with court orders and subpoenas and cooperates with investigations by state and federal agencies. Under these circumstances your account information may be shared with others with or without your knowledge or consent.

[REMAINDER OF SUB-HEADING OMITTED]

AAdvantage Award Conditions

To ensure you receive credit for your AAdvantage transactions , please provide your AAdvantage number when you make your travel reservations or use the services of our partners American Airlines may , in its discretion , change the AAdvantage program rules, regulations, travel awards, and special offers at any time with or without not ice . This means that the

accumulation of mileage credit does not entitle members to any vested rights with respect to such mileage credits, awards or program benefits. In accumulating mileage or awards, members may not rely upon the continued availability of any award or award level, and members may not be able to obtain all offered awards for all destinations or on all flights. Any award may be withdrawn or subject to increased mileage requirements or new restrictions at any time. American Airlines may, among other things, (i) withdraw, limit, modify, or cancel any award; (ii) change program benefits, mileage levels, participant affiliations, conditions of participation, rules for earning, redeeming, retaining or forfeiting mileage credit, or rules for the use of travel awards; or (iii) add travel embargo dates, limit the number of seats available for award travel (including , but not limited to, allocating no seats on certain flights) or otherwise restrict the continued availability of travel awards or special offers. American Airlines may make anyone or more of these changes at any time even though such changes may affect your ability to use the mileage credit or awards that you have already accumulated. American Airlines reserves the right to end the AAdvantage program with six months notice. AAdvantage travel awards, accrued mileage credits and special offers are subject to government regulations. American Airlines is not responsible for products and services offered by other participating companies. Any departure fee, immigration fee, security fee, tax liability surcharge, passenger facility charge

or any other fee or surcharge (whether enacted by a governmental
authority or otherwise) is the responsibility of the passenger and/or the AAdvantage member.
["FLIGHT AWARDS" SUB-HEADING OMITTED]

General AAdvantage Conditions

- At no time may AAdvantage mileage credit or award tickets be purchased, sold or bartered. Any such mileage or tickets are void if transferred for cash or other consideration. Violators (including any passenger who uses a purchased or bartered award ticket) may be liable for damages and litigation costs, including American Airlines attorneys fees incurred in enforcing this rule.
- Use of award tickets that have been acquired by purchase or for any other consideration may result in the tickets being confiscated or the passenger being denied boarding. If a trip has been started, any continued travel will be at the passenger's expense on a full-fare basis. The passenger and member may also be liable to American Airlines for the cost of a full fare ticket for any segments flown on a sold or bartered ticket.
- Fraud, misrepresentation, abuse or violation of applicable rules (including, but not limited to, American or American Eagle conditions of carriage, tariffs and AAdvantage program rules) is subject to appropriate administrative and/or legal action by appropriate governmental

authorities and American Airlines. Such action may include, without limitation, the forfeiture of all award tickets, and any accrued mileage in a member's account, as well as cancellation of the account and the member's future participation in the AAdvantage program. In addition, American Airlines reserves the right to take appropriate legal action to recover damages, including its attorney fees incurred in prosecuting any lawsuit.

- American Airlines reserves the right to audit any and all accounts at any time and without notice to the member to ensure compliance with AAdvantage program rules and applicable conditions of carriage and/or tariffs. In the event that an audit reveals discrepancies or violations, the processing of AAdvantage awards, mileage accrual and summaries may be delayed until the discrepancies or violations are resolved satisfactorily to American Airlines. Pending such resolution, members may be prohibited from redeeming mileage credits for an AAdvantage award or ticket as determined in American's sole discretion.
- If American Airlines and/or any AAdvantage participant improperly denies a member mileage credit, travel award, or some other benefit, the member' s exclusive remedy shall be the issuance of the improperly denied credit, award or benefit if available, or such other alternative comparable benefit as determined by American , which shall have no additional

liability whatsoever. In no event shall American Airlines or any AAdvantage participant be liable to any member, or anyone claiming through a member, for any direct, indirect or consequential damages, or lost revenue or profits, arising out of American Airlines or any AAdvantage participant acts or omissions in connection with the AAdvantage program.

[REMAINDER OF DOCUMENT OMITTED]

- [DEFENDANT'S EXHIBIT NO. 6]

AMR CORPORATION FORM 10-k

Frequent Flyer Program

American established the AAdvantage frequent flyer program (AAdvantage) to develop passenger loyalty by offering awards to travelers for their continued patronage. The Company believes that the AAdvantage program is one of its competitive strengths. AAdvantage benefits from a growing base of approximately, sixty million members with desirable demographics who have demonstrated a strong willingness to collect AAdvantage miles over other loyalty program incentives and are generally disposed to adjusting their purchasing behavior in order to earn additional AAdvantage miles. AAdvantage members earn mileage credits by flying on American, American Eagle, and the American Connection carriers or by using services of other participants in the AAdvantage program. Mileage credits can be redeemed for free, discounted or upgraded travel on American, American Eagle or other participating airlines, or for other awards. Once a member accrues sufficient mileage for an award, the member may book award travel. Most travel awards are subject to capacity controlled seating . A member's mileage credit does not expire provided that member has any type of qualifying activity at least once every 18 months.

American sells mileage credits and related services to other participants in the AAdvantage program. There are over 1,000 program participants, including a leading credit card issuer, hotels, car rental companies and other products and services

companies in the AAdvantage program. The Company believes that program participants benefit from the sustained purchasing behavior of AAdvantage members, which translates into a recurring stream of revenues for AAdvantage. Under its agreements with AAdvantage members and program participants, the Company reserves the right to change the AAdvantage program at any time without notice, and may end the program with six months notice. As of December 31, 2007, AAdvantage had approximately 60 million total members, and 613 billion outstanding award miles. During 2007, AAdvantage issued approximately 200 billion miles, of which approximately one-half were sold to program participants. See Critical Accounting Policies and Estimates under Item 7 for more information on AAdvantage.

[REMAINDER OF REPORTER'S RECORD OMITTED]